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# Merger control and the public interest: balancing EU and national law in the protectionist debate

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## A. INTRODUCTION

The market for corporate control plays an important role in disciplining the management of companies and can drive economic efficiency.<sup>1</sup> Not only do mergers and acquisitions (“M&A”s)<sup>2</sup> provide the opportunity for management innovation, the purchase of weak firms and the movement of capacity from declining to growth sectors, but they may allow the merging firms to engage in efficient consolidation, to increase productivity and to deliver technological innovation and efficiencies, for example, through achieving complementarities, economies of scale and scope. In recent years, cross-border M&As, through foreign direct investment (“FDI”),<sup>3</sup> have increased dramatically in response to technological change, global competition and the liberalisation of markets.<sup>4</sup> FDI has played a key role in the process of global economic integration and has been “positively correlated with growth”;<sup>5</sup> for developed countries “the limited evidence available indicates fairly consistently that the productivity of domestically owned firms is positively related to the presence of foreign firms”,<sup>6</sup> “that FDI triggers technology spillovers, assists human capital

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<sup>1</sup> See e.g., RS Ruback and MC Jensen, “The Market for Corporate Control: The Scientific Evidence” (1983) 11 *Journal of Financial Economics* 5.

<sup>2</sup> Although the term merger broadly refers to a situation where two or more formerly independent entities unite, every State adopts its own definition of what constitutes a merger for the purposes of their merger control rules (or other relevant legislation). For the EU definition see *infra* n 16 and text.

<sup>3</sup> A company may make an investment in another country either by merging, setting up a joint venture with, or acquiring control over or a shareholding in, a business already registered in that country or by setting up its own business or subsidiary there (greenfield investment). The OECD defines FDI as an investment that “reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise. The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a relationship”, see its Glossary at <http://www.oecd.org/daf/inv/investmentfordevelopment/2487495.pdf>. In Case C-171/08, *Commission v Portugal* [2010] ECR I-6817, para 49, the Court of Justice (“Court”) distinguished between direct investment, in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management or control, and portfolio investment, involving investment in the form of acquisition of shares on the capital market for the purposes of making a financial investment without the intention of influencing management or control. This article focuses principally on measures within the EU which may preclude direct investment (or mergers) through, e.g., merger or foreign investment control rules. In 2007, an OECD report noted that cross-border M&As represented an estimated 80 per cent of total FDI flows among OECD countries, see OECD, *Economic and Other Impacts of Foreign Corporate Takeovers in OECD Countries* (2007).

<sup>4</sup> See Almunia, SPEECH/13/360 “The evolutionary pressure of globalisation on competition control” ICN 12th annual conference, Warsaw, 24 April 2013 (FDI “passed from 6.5 % of world GDP in 1980 to over 30% before the onset of this long [financial and economic] crisis”).

<sup>5</sup> IMF Working Paper, Middle Eastern Department, WP/OI/175 “Determinants of, and the Relation between, Foreign Direct Investment and Growth: A Summary of the Recent Literature” Prepared by Ewe-Ghee Lim, November 2001.

<sup>6</sup> Ibid. For a discussion of some of the benefits which have resulted in the UK from high amounts of inward and outward FDI, see speech of A Chisholm, “Public interest and competition-based

formation, contributes to international trade integration, helps create a more competitive business environment and enhances enterprise development”<sup>7</sup> and that foreign owned firms outperform domestic ones in host countries. Cross-border M&As may thus promote economic growth by raising total factor productivity, gross domestic product and the efficiency of resources used in the host economy.<sup>8</sup>

Despite the potential for mergers to produce benefits, there is concern that many (or even most) mergers in fact fail to realise the efficiencies and innovation predicted and, consequently, the increase in value for shareholders.<sup>9</sup> Indeed, one report commissioned by the European Commission (the “Commission”) concluded that even if mergers do sometimes create efficiencies there seemed to be “no empirical support for a general presumption” that they do so.<sup>10</sup> In addition, mergers may be driven by a desire to increase (or have the consequence of increasing) market power<sup>11</sup> and many major economies across the globe are sensitive about capital flows in and out of their States, the costs and benefits of inward FDI – especially when in the form of foreign takeovers<sup>12</sup> – and its impact on national security, businesses perceived to be of national strategic importance, technological capabilities, jobs and exports.

Although it may be difficult to second-guess and to identify in advance those mergers that will, or will not, work out for the company, the economy and shareholders,<sup>13</sup> most jurisdictions do not leave the market unbridled to govern the outcome of a merger proposal but scrutinise proposed mergers with, or foreign investment in, domestic companies carefully, not only to assess the impact of such conduct on competition and efficiency, but also to assess its effect on national security or the wider public interest. Policies towards foreign takeovers have become increasingly stringent since the 1990s and, in recent years, there have been numerous instances, both within and outside of the EU, in which the impact of a proposed merger on the national interest, and the

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merger control: An agency perspective on the lessons from evolution of the current regime” 12 September 2014, Fordham Competition Law Institute Annual Conference, 8-9.

<sup>7</sup> Given the appropriate host-country policies and a basic level of development, OECD, *Foreign Direct Investment for Development: Maximising Benefits and Minimising Costs* (2002) (concluding that the macroeconomic benefits of inward FDI in most cases outweigh the costs. See also OECD n 3.

<sup>8</sup> OECD, n 3, 68-70 (cross-border openness may also contribute to national security and regional or international stabilisation). See also A Nourry and N Jung, “Protectionism in the Age of Austerity - A Further Unlevelling of the Playing Field” (2012) 8(1) *Competition Policy International* 1.

<sup>9</sup> See e.g., speech/02/252, M Monti, “Review of the EC Merger Regulation – Roadmap for the Reform Project”, speech to British Chamber of Commerce, Brussels, 4 June 2002 and Chisholm, n 6.

<sup>10</sup> See L-H Röller, J Stennek, F Verboven, “Efficiency Gains From Mergers”, *European Economy*, no5/2001, Brussels and speech by Monti, *ibid*.

<sup>11</sup> FM Scherer and D Ross, *Industrial Market Structure and Economic Performance* (3rd edn., Houghton Mifflin, 1990), 160.

<sup>12</sup> Although economic theory is neutral as to the form FDI takes, Governments tend to be more welcoming of FDI through greenfield investment (see n 3) and more suspicious of FDI through foreign M&As, OECD, n 3, 70-71.

<sup>13</sup> See e.g., Chisholm, n 6. But see the discussion of the “net benefit” test used in foreign investment review in Canada (and which has been suggested in a legislative proposal in the US), *infra* nn 65 and 66.

pros and cons of inward FDI more generally, has provoked debate which is reported on extensively in the media. Indeed, this trend of greater suspicion towards foreign investment looks set to continue as popular backlash against foreign control of key national businesses, and calls for Governments to protect national industry, appear to be mounting. Within the EU for example, in 2014, Pfizer's proposed acquisition of UK pharmaceuticals company, AstraZeneca, and General Electric's ("GE") proposed acquisition of French energy and transport company, Alstom, triggered significant national anxiety in the UK and France respectively. In both jurisdictions commentators expressed concern about the impact of the proposed transactions on the national interest and both cases raised the potential for differences in opinion as to how the benefits and costs of the respective transactions should be assessed and weighed and a clash between proponents of the principle of an open market economy and proponents of greater protectionism.

An important additional feature of cases arising in the EU, however, is that they raise delicate issues relating to the balance of competence between the EU and the Member States. Within the EU, there are significant differences manifest between the attitudes and policies displayed towards FDI and cross-border mergers by the EU, on the one hand, and a number of the Member States, on the other and between the Member States more generally. The EU, in particular, has, in recent years, generally sought to establish a reputation as an open environment for foreign investment and trade. Not only are the four fundamental freedoms specifically designed to achieve an EU internal market within which goods, persons, services and capital can move freely between the Member States, but the free movement of capital provisions also extend to movements between the Member States and third countries.<sup>14</sup> In addition, the EU works for the abolition of restrictions on international trade and open markets in bilateral and global relations, advocating the view that such measures drive growth and create jobs to the benefit of all EU citizens. Although the Commission does have an extensive general power under the EU Merger Regulation, Regulation 139/2004 ("EUMR"),<sup>15</sup> to review foreign investment through large scale "concentrations" (essentially, mergers between two or more undertakings, changes in control over an undertaking and the creation of autonomous full-function joint ventures<sup>16</sup>) with an EU dimension,<sup>17</sup> these provisions do not draw a formal policy distinction between EU and non-EU investment but only permit the Commission to prohibit transactions which may lead to a significant impediment to effective competition in the EU. The EUMR is thus based on "competition" interests and is designed to prevent mergers which will limit competition between the merging parties and result in higher prices, lower quality, services and products, and/or reduced output or innovation to the detriment of consumers.

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<sup>14</sup> The framework in relation to third countries has some differences, see *infra* n 26 and C.2.d.ii.

<sup>15</sup> [2004] OJ L 24/1.

<sup>16</sup> EUMR, Art 3.

<sup>17</sup> EUMR, Art 2 and see *infra* C.3.

Most of the Member States, in contrast, have broader powers to assess the impact of a merger, or foreign M&As, on both competition *and* the “public interest”.<sup>18</sup> Indeed, it will be seen in this paper that they do, not infrequently, rely on such powers (or consider relying upon them), both to shield nationally important firms from significant foreign investment and/or to support the creation of “national champions”, and concerns have been voiced about “serious signals of an increase in protectionist threats in Europe”.<sup>19</sup>

Given the different approaches manifest, the important question addressed in this article is who has competence, and when, to interfere with the market for corporate control and to weigh the economic and other costs and benefits of M&A activity within the EU; is it competition or other regulatory or administrative authorities and/or politicians, and at what level, that of the EU and/or the Member States? It is well-established in the EU, that competition authorities should have the power to assess the impact on mergers using an economics-based competition assessment. Since 1990, not only have EU merger rules conferred explicit power on the Commission to review certain concentrations and to assess their impact on competition within the EU, but the EUMR sets out well-trodden rules which allocate jurisdiction to appraise such concentrations between, respectively, the Commission and the national competition authorities of the Member States (“NCAs”, which appraise concentrations without an EU dimension under national law).<sup>20</sup>

This paper consequently focuses on the more controversial issue which has received relatively little attention in the literature; the extent to which public policy factors are permitted to impact on merger control within the EU and to override competition law assessments. In particular, it analyses (i) how EU law, especially the free movement rules and the EUMR limit the ability of the Member States *either* to impose obstacles in the path of foreign mergers (whether from inside or outside of the EU/EEA) *or* to authorise the creation of national champions, on public interest grounds and (ii) how EU law seeks to balance EU goals against the acutely felt and sensitive national interests at stake.

In order to resolve these issues, section B commences by introducing more fully when EU or Member States may take account of public interest factors under merger, foreign investment or other rules. Section C then goes on to examine the relationship between EU and national law in this sphere, the constraints that EU law imposes on the enactment, or exercise, of national rules and the implications for the types of national law referred to in section B. It notes that although EU law recognises the right of Member States to put obstacles in the path of foreign mergers where necessary to protect public interest, policy and/or security matters in their States, it nonetheless plays an interventionist role, imposing important checks on their ability to do so, which are often not fully reflected on, or covered, in national debates

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<sup>18</sup> It will be seen in the discussion below that the Member States and EU law adopt differing notions and/or definitions of the public interest. The term is used broadly here to refer to any “non-competition” factors which might impact on the assessment of a merger.

<sup>19</sup> Including by (then) Vice-President Almunia of the Commission, see GCR, “The Europeans Champions League” 25 July 2014 (noting “a marked increase in protectionist grumblings in parts of Europe”).

<sup>20</sup> See *infra* C.3, especially n 166.

surrounding controversial proposed M&A transactions. Indeed, it indicates that those limits are greater than is perhaps generally recognised. In addition, Member States must not exercise national law in a manner which violates these rules or the EUMR. Given concerns about a rising tide of protectionism within the EU, an important issue which is also considered is whether EU law has effective enforcement mechanisms in place which can be used to prevent a Member State enacting, or relying on, legislation which is in breach of EU law (see section D).

Sections D and E conclude that although EU law clearly prohibits national laws that impose unjustified obstacles in the path of investment from other EU Member States, it may not always be able to prevent the authorisation of national champions which may damage competition within the EU and that changes to the EUMR would be required to deal with this latter problem. Further, the extent to which Member States are able to control investments from third countries (outside of the EU/EEA, especially where EU firms have no reciprocal access to the home jurisdiction of the acquiring firm) is extremely sensitive and controversial and requires clarification. It is also noted that although some problems do lie in preventing Member States from taking protectionist steps and violating fundamental provisions of EU law, enforcement mechanisms are in place which can help to ensure the effectiveness of EU law.

## **B. MERGER AND FOREIGN INVESTMENT CONTROL WITHIN THE EU**

### **1. THE EU APPROACH**

The EU has exclusive competence over competition law in so far as it is necessary for the establishment of an internal market and has had exclusive competence over FDI since Lisbon.<sup>21</sup> The EU has not yet, however, concluded any bilateral investment Treaty (“BIT”) or free trade agreement with an investment chapter<sup>22</sup> or generally enacted rules which specifically control foreign investment.<sup>23</sup> The EU’s current

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<sup>21</sup> Treaty on the Functioning of the European Union (“TFEU”), Art 3(1)(b) (conferring exclusive EU competence over competition) and Art 3(1)(e) (conferring exclusive EU competence over the common commercial policy (“CCP”) – TFEU, Art 207 provides that the CCP is based on uniform principles with regard to a number of factors, including FDI). Exclusive competence means that only the EU may legislate and adopt legally binding acts unless it empowers Member States to do so (see Treaty on European Union (“TEU”), Art 2(1)). The original Treaty establishing the European Economic Community (“EEC”) has been amended, and renumbered, on a number of occasions, including by the Single European Act and the Treaties of Maastricht (the Treaty on European Union (“TEU”)), Amsterdam, Nice and, most recently, Lisbon. Prior to the Treaty of Lisbon, the CCP only encompassed aspects of foreign investment.

<sup>22</sup> It is, however, in the process of negotiating some, including with the US (the Transatlantic Trade Investment Partnership (“TTIP”) and Canada (a draft of the EU-Canada Comprehensive Trade and Economic Agreement (“CETA”) is available on the Commission’s website), see <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/>. Prior to Lisbon, the individual Member States had, between them, negotiated in excess of 1000 BITs. Many of these will remain in force until they are replaced by new EU Treaties, see Regulation 1219/2012 [2012] OJ L 315/40. The EU is, however, a member of the Energy Charter Treaty (a regional agreement relating to energy investment).

<sup>23</sup> But see, however, an exception which operates in the airlines industry, Regulation 1008/2008 [2008] OJ L 293/3, Art 4(f) (stating that an undertaking is to be granted an operating licence provided that certain conditions are satisfied including that Member States and/or nationals of

approach to foreign investment, not only between Member States but from third countries, is ordinarily to welcome and encourage it and to support the principle of an open market economy.<sup>24</sup>

First, in addition to the internal market provisions relating to the free movement of goods (Article 34 TFEU), services (Article 56 TFEU) and freedom of establishment (Article 49 TFEU), Article 63 TFEU prohibits, subject to limited exceptions<sup>25</sup> “all restrictions on the movement of capital” between Member States and between Member States and third countries. Uniquely amongst, the four freedoms, the capital rules have applied, since the Maastricht Treaty, to support the rules on the single currency, not only to restrictions on flows of capital between EU Member States but also to restrictions on flows between EU and third countries, albeit subject to a less liberalised framework. Arguably these capital rules reach “beyond any comparable foreign investment law or constitutional provision in any other jurisdiction in the world”<sup>26</sup> and they are discussed in greater detail in section C below.

Secondly, the EU is committed to the progressive abolition of restrictions on FDI<sup>27</sup> and works, through its participation in organisations such as WTO, OECD, G20 and G8, to promote a level playing field, based on open and sustainable investment. The EU has so far been resistant to calls for the introduction of broader laws to prevent foreign owners from spiriting away “technology” and moving “the workforce outside of Europe”.<sup>28</sup> For example, Commissioner Almunia has stated:

“Europe should continue to welcome foreign investments – just as we wish European investments to be welcomed in other parts of the world – because these deals bring benefits to everyone. Our economies need access to competitive services and investments, and our companies can only become real European or global champions

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Member States own more than 50 % of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the EU is a party).

<sup>24</sup> See TFEU, Art 119 and 206, but see e.g., Nourry and Jung, n 8, 8-9.

<sup>25</sup> See *infra* C.2.b.

<sup>26</sup> See [http://ec.europa.eu/internal\\_market/capital/third-countries/treaty\\_provisions/index\\_en.htm](http://ec.europa.eu/internal_market/capital/third-countries/treaty_provisions/index_en.htm). The original EEC Treaty provision on free movement of capital (EEC, Art 67) had limited reach but the provision was radically overhauled (to its current wording, now in TFEU, Art 63) by the Maastricht Treaty to support the rules on the single currency and to ensure liberalisation for the benefit of EU citizens, companies and governments; free movement of capital will lead to optimal allocation of resources and the integration of open, competitive and efficient EU markets, help to maintain responsible macro-economic policy and foster growth through financial and knowledge transfers. Three reasons for the extended territorial scope for the capital provisions are that free movement of capital between Member States would undermine capital control towards third countries as investors would enter/exist the EU via the most liberal jurisdiction to access the target state; it bolsters the credibility of the single currency; and contributes to the principle of an open market economy, see C Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press, 4<sup>th</sup> edn, 2013), 584-5, relying on J Snell, “Free movement of capital: Evolution as a non-linear process” in P Craig and G de Búrca (eds) *The Evolution of EU Law* (Oxford University Press, 2011).

<sup>27</sup> See *supra* n 24.

<sup>28</sup> The EU has power under TFEU, Arts 64(2)(3) and 66 to take measures on the free movement of capital in certain circumstances but it has not yet exercised these powers.



if they are encouraged to become more innovative and efficient; not if they are shielded from competition. Closing home markets as a reaction to protectionism abroad can only be a damaging move for everyone. Therefore, we must work for reciprocity in opening markets – not in closing them.”<sup>29</sup>

Indeed, it is possible that new investment Treaties currently being negotiated by the EU with third countries, such as the US and Canada, will include both post-establishment commitments, not to discriminate against foreign investors compared with domestic, or other third-country, investors, to ensure fair and equitable treatment of foreign investors and not to impair foreign investment through arbitrary or unreasonable measures, and pre-establishment obligations, setting out an obligation not to subject foreign investors wishing to enter the EU to less favourable treatment than nationals, or investors from other third countries, unless an exception applies (for example, for national security or for certain excluded sectors set out in a negative list).<sup>30</sup>

Thirdly, although the Commission has jurisdiction to scrutinise foreign investment through “concentrations” with an EU dimension under the EUMR, these rules only ensure that corporate reorganisations do not result in lasting damage to the competitive environment in the internal market and provide no explicit basis for distinguishing between concentrations depending on where the investment emanates from. On the contrary, the Commission staunchly maintains that it conducts merger analysis in a way that is free of considerations that are not relevant to competition enforcement. Thus despite wrangling at the time EU Merger control rules were first introduced over the question of whether the substantive test for assessment of mergers should be based solely on “competition” grounds, and the obligation of the Commission to conduct its appraisal within the general framework of the fundamental objectives of the Treaties,<sup>31</sup> the Commission has, to date, not accepted that the substantive test for the assessment of EU mergers, opens the door to industrial policy or other non-competition considerations, such as social policy. In particular:

- (a) The Directorate-General for Competition at the Commission (“DG Comp”) has not, when scrutinising mergers, been willing to endorse attempts by Member States to protect or create national champions which are not to the consumers’ advantage or which form an obstacle to competition. Rather, it adheres to the view that EU rules allow firms to search for the best scale and size to compete globally, but ensures that they face sufficient competition to secure performance in

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<sup>29</sup> SPEECH/11/561, Policy Objectives in Merger Control, Fordham Competition Conference, New York, 8 September 2011. See also report prepared by M Monti for the President of the European Commission, “A New Strategy for the Single Market: At the Service of Europe’s Economy and Society”, 9 May 2010.

<sup>30</sup> See *supra* n 22 and e.g., CETA, Art X.7. Most BITs negotiated by EU Member States do not incorporate pre-establishment commitments.

<sup>31</sup> See e.g., A Jones and B Sufrin, *EU Competition Law: Text, Cases, and Materials* (OUP, 5 edn, 2014), ch 15.

international markets. It has thus at times, controversially precluded mergers which would have created a national champion;<sup>32</sup>

- (b) Although some commentators have expressed concern that the Commission's willingness to adopt an expansive approach to the concept of an undertaking and single economic unit in the context of state-owned enterprises ("SOE"s) heightens the risk of EU merger review and distorts merger assessment involving, for example Chinese companies,<sup>33</sup> the Commission has stressed that it applies the same criteria to all transactions, wherever the inward investment originates from:<sup>34</sup>

"And I can assure you that EU merger control will remain on that track. I can give you concrete examples of this. Earlier this year we cleared without conditions a string of mergers involving companies owned by the Chinese state: China National Bluestar/Elkem, DSM/Sinochem, Petrochina/Ineos, and Huaneng/Intergen. In all these cases, we applied the same criteria that we adopt to assess mergers involving companies controlled by EU countries. This goes to show that our analysis is based on competition considerations only, and is irrespective of the nationality of the companies. And I expect that European companies will enjoy the same treatment when competition authorities in other parts of the world review their merger projects";

- (c) The EUMR affords no grounds for applying less favourable rules, and for retaliating against, companies of third countries that discriminate against EU companies in their own merger control or foreign investment legislation;<sup>35</sup>
- (d) It is true that final merger decisions are taken by the College of Commissioners,<sup>36</sup> and that in some controversial or politically charged cases vigorous lobbying of the Competition Commissioner<sup>37</sup> or the other Commissioners takes place. Nonetheless, it does not appear that such lobbying has, in recent years at least,<sup>38</sup> affected the final outcome of merger decisions. Thus although some high-profile

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<sup>32</sup> See, e.g., IP/04/501, "The Commission puts industry centre stage and reinforces competitiveness in an enlarged European Union", Case M.469, *MSG Media Service GmbH* (1994) and Case M.1672, *Volvo/Scania* (2001).

<sup>33</sup> See e.g., A Zhang, "The Single Entity Theory: An Antitrust Time-bomb for Chinese State-Owned Enterprises" (2012) 8(4) *Journal of Competition Law and Economics* 805.

<sup>34</sup> SPEECH/11/561, n 29.

<sup>35</sup> Rather, it provides for the possibility of negotiation with third countries for obtaining comparable treatment for undertakings have their seat or principal field of activity in the EU, EUMR, Art 24.

<sup>36</sup> A political body of appointees that is not directly involved in the process leading up to the adoption of the decision.

<sup>37</sup> For example, prior to the Commission's decision in Case M.7018 *Telefonica Deutschland/E-Plus* (2014), Angela Merkel and Jean-Claude Juncker (now President of the Commission) expressed their view that the Commission should make it easier for telecom operators to merge so that they can compete more effectively in international markets.

<sup>38</sup> But see e.g., Case M.315, *Mannesmann/Vallourec/Ilva* (1994) (where DG Comp had proposed prohibiting the merger on the ground that it would lead to the creation of a collective dominant position on the Western European market for seamless steel tubes, but the concentration was strongly supported by the Commissioner responsible for industry and ultimately cleared narrowly by the Commission, W Sauter, *Competition Law and Industrial Policy in the EU* (Clarendon Press, 1997), 140).

merger cases, such as the merger between NYSE Euronext and Deutsche Börse or other proposed concentrations which might have created a European champion,<sup>39</sup> may have caused public clashes between advocates of industrial policy and supporters of a competition policy based strictly on competition factors alone, in most cases the Commission has resolutely opposed mergers which will significantly impede effective competition in the EU.<sup>40</sup> In practice, therefore, the College of Commissioners ordinarily accept the decisions prepared by DG Comp overseen by the Commissioner for competition. It is noteworthy, however, that in 2012 then Commission President Barroso asked Commissioner Almunia to give early advance notice of cases with a dimension going beyond the scope of competition policy which might impact on other EU policies.<sup>41</sup> In addition, it remains to be seen whether the position will change under the new Commission and how its new structure, emphasising cooperation and coordination between the Commissioners, might translate in policy terms.<sup>42</sup>

Even though it is possible that things might change in the future, Competition Commissioners have, to date, worked hard to send the message that industrial and other “non-competition” criteria do not prevail in EU merger policy.<sup>43</sup> In addition, it is seen in section C that the Commission seeks to tackle “nationalistic” or “protectionist” measures by Member States by bringing proceedings against them where national rules, or actions based upon them, breach EU law.

## 2. THE APPROACH OF THE MEMBER STATES

Most of the EU Member States, in contrast, have in place laws, whether set out in merger, regulatory, foreign investment, or other, rules, which permit Governments, or NCAs, to take account of a broader range of “non-competition” - public interest or public policy - factors in determining whether a merger, acquisition or investment should be authorised, prohibited or otherwise controlled. The range of applicable rules and relevant public interest factors vary significantly from Member State to Member State but, collectively, potentially allow for a vast spectrum of issues to impact on the assessment of whether a proposed investment or merger transaction should be able to proceed.<sup>44</sup> In particular:

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<sup>39</sup> See e.g., Case M.6166, *NYSE Euronext/Deutsche Börse* (2012).

<sup>40</sup> See e.g., Case M.53, *Aérospatiale-Alenia/de Havilland* (1991), Case M.469, *MSG/Media Services GmbH* (1994), Case M.1672, *Volvo/Scania* (2001), Case M.6166, *ibid* and SPEECH/09/152, N Kroes, “Competition, the crisis and the road to recovery”, Address at Economic Club of Toronto, Toronto, 30 March 2009.

<sup>41</sup> See minutes of the 2022<sup>nd</sup> meeting of the Commission, PV(2012)2022 final. A few cases, see e.g., n 38 and Case M.6471, *Outokumpu/Inoxum* (2014) are discussed, therefore, where the decision needs to be considered in a wider context. As the Commission’s decisions are subject to review by the EU courts, they would of course risk annulment if, for political purposes, the law were to be misinterpreted or misapplied.

<sup>42</sup> In particular, the Competition Commissioner has to contribute to projects steered or coordinated by, and to liaise closely with, the Vice President for Jobs, Growth, Investment and Competitiveness, see e.g., Mission Letter from Jean-Claude Juncker to Margrethe Vestager, [http://ec.europa.eu/about/juncker-commission/docs/vestager\\_en.pdf](http://ec.europa.eu/about/juncker-commission/docs/vestager_en.pdf).

<sup>43</sup> See, e.g., Monti, n 9, and Sauter, n 38, 140.

<sup>44</sup> See e.g., *Getting the Deal Through Mergers* 2014, and answers to questions 8 and 22.

- (1) A number of Member States permit the Government to intervene in, and to review, relevant mergers which raise public interest considerations and where necessary to override any competition law assessment conducted.<sup>45</sup> These powers may permit the Government either to prohibit (or subject to conditions) relevant mergers, and/or to authorise them on public interest grounds. For example, in France, the French Minister for the Economy has broad power to intervene at the end of second phase merger analysis conducted by the competition authority and to take decisions based on public interest factors (other than the maintenance of competition such as industrial development, maintaining employment or the competitiveness of the undertakings in international markets),<sup>46</sup> and in the UK, the Enterprise Act 2002 (“EA”)<sup>47</sup> permits the UK Secretary of State both to prohibit, subject to conditions or to authorise relevant mergers on defined public interest grounds – currently national security, media public interest considerations and the stability of the UK financial system (although new public interest considerations may be added by the Secretary of State by order<sup>48</sup>). In *Lloyds TSB/HBOS*, for example, the UK Government took the view that the public interest in the stability of the UK financial system outweighed the concerns of the NCA that the merger was likely to lead to a substantially lessening of competition in relation to banking services and the provision of mortgages in the UK. It thus encouraged and authorised the merger.

Further: in Germany, the Federal Minister of Economics and Technology can, under the terms of the Competition Act, intervene in the application of national merger rules and authorise a merger (and overrule a decision of the German NCA, the Bundeskartellamt, to prohibit it), if the negative effect of the merger on competition is outweighed by the benefits to the economy as a whole or if the merger is justified by an overriding public interest;<sup>49</sup> in the Netherlands, the minister of economic affairs may, upon the refusal by the competition authority to issue a license clearing a merger, issue a licence authorising an envisaged concentration on general interest (whether economic or non-economic) grounds;<sup>50</sup> and Ministers in a number of other jurisdictions have power to veto, subject to

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<sup>45</sup> In Belgium, the Government’s power to overturn merger decisions of the competition authority on public interest grounds was withdrawn in September 2013, 2013 Belgian Competition Act.

<sup>46</sup> Although to date this power has never been used.

<sup>47</sup> Prior to the EA, the UK merger regime set out in the Fair Trading Act 1973 required the authorities to apply a public interest test and to take account of all matters which appeared to be relevant. For the view that such a broad public interest test led to a lack of transparency and predictability and room for the exercise of political preferences and that the EA regime, establishing a fully independent and competition-based regime has been positive for businesses and has promoted public confidence in the regime, see Chisholm, n 5.

<sup>48</sup> EA, s 58. There also rules in place in relation to mergers which raise special public interest considerations (including those involving certain government contractors that possess information relating to defence and of a confidential nature).

<sup>49</sup> See e.g., the discussion of the merger between E.ON and RuhrGas *infra* n 219.

<sup>50</sup> Dutch Competition Act, s 47 (although the minister cannot prohibit a merger approved by the competition authority).

conditions, or authorise M&A transactions relating to assets in key industries, such as defence, national security, energy, communications and transportation.<sup>51</sup>

In some jurisdictions “non-competition” considerations, in particular industrial policy, may also play a role in the merger control conducted by the NCA. In Austria and Italy, for example, NCAs can exceptionally authorise concentrations having adverse effects on competition if necessary to preserve or enhance the international competitiveness of the undertakings involved<sup>52</sup> or for reasons connected with the general interests of the national economy.<sup>53</sup> In some cases NCAs may also have to take into consideration opinions of, or cooperate with, sector-specific regulatory bodies, for example, in the telecoms, financial, insurance or health sectors;

(2) Some Member States also have specific rules governing foreign investment. For example:

- in Germany, in 2009 rules were enacted which restrict the direct or indirect acquisition of at least 25% of the voting rights of a German company on public interest grounds, in particular where an acquisition by a non EU / EFTA (European Free-Trade Area) investor endangers the public order or security of the Federal Republic of Germany or where the acquisition by a foreign (including EU/EFTA) investor is of a German company whose activity is defence-related and so endangers the security interests of the Federal Republic of Germany;<sup>54</sup>
- in France, foreign investments in companies registered in France which operate in a broad spectrum of specified sectors are subject to an ex ante governmental authorisation system.<sup>55</sup> These foreign investment rules were amended, following the approach by GE to Alstom, in May 2014,<sup>56</sup> by expanding the scope of strategic sectors covered (to include energy, water, transport, electronic communications, protection of public health) and requiring authorisation for these sectors where the activities exercised by the

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<sup>51</sup> This is the case e.g. in Italy, where the Strategic Assets in these sectors have been specifically identified (see e.g., D.P.C.M. November 30, 2012 No. 253, as amended by D.P.C.M. October 2, 2013 n 129 and Presidential Decree March 25, 2014, No. 85 (there must however be an “exceptional effective threat of serious prejudice” of the relevant defence, national security or other national interest at stake, Law Decree March 15, 2012 No. 21 (amended by Law May 11, 2012 No. 56)); and in Spain, see Ninth Additional Provision of Law 3/2013, 4 June, on the creation of the National Markets and Competition Commission.

<sup>52</sup> See Austrian Cartel Act, s 12(2). This provision has not had practical relevance for some time, however.

<sup>53</sup> Italian Antitrust Law, s 25(1) (as the criteria as to how this provision should be applied have not been laid down, the exception has not been applied). But see e.g., Case Nos. 19248 and 23496 *Alitalia/AirOne*, 3 December 2008 and 11 April 2012.

<sup>54</sup> The German Foreign Trade Ordinance.

<sup>55</sup> See the French Monetary and Financial Code and Decree No. 2005-1739. All investments must be formally notified to, and approved by, the Treasury and a standstill obligation applies. A stricter regime applies for non-EU/EEA investments.

<sup>56</sup> Decree No.2014-479 (the French Decree on Foreign Direct Investments of 14 May 2014), see also discussion of the proposed merger between GE and Alstom *infra* n 78 and text.

French company in which the investment is contemplated are essential to guarantee the country's interests in relation to public order, public security or national defence;<sup>57</sup>

- in Austria, certain investments in companies with their registered seat in Austria by foreign buyers (that are located outside the EU/EEA or Switzerland) relating to public security and public order have to be notified to the Federal Ministry of Economy, Family and Youth for approval under the Foreign Trade Act;<sup>58</sup>
- in Italy the government may prohibit an acquisition of an Italian company by a foreign company for reasons of national economy if, in the country of origin of the buyer, Italian companies are subjected to discrimination, in particular in relation to their ability to acquire local companies.<sup>59</sup>

Thousands of bilateral investment treaties ("BIT"s) also exist between EU Member States and third countries.<sup>60</sup>

- (3) In a number of Member States, various regulatory approvals and/or consultations are required under sector-specific legislation for the acquisition of certain regulated businesses and businesses operating in specific sectors, for example the financial or insurance sector,<sup>61</sup> health sector,<sup>62</sup> cinema exhibition services, telecommunication, energy, broadcasting or media companies.<sup>63</sup>

The EU Member States are not alone in their concern about the wider public policy issues raised by mergers. A number of other major economies across the globe also have specific powers to review foreign investment or to take account of industrial policy and other non-competition factors in the application of the merger control regime or other regulatory rules. For example, in the US the President has power to block foreign acquisitions where "there is credible evidence ... that the foreign

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<sup>57</sup> The list of sectors covered, which are broader when the investment contemplated is by a non-EU/EEA investor, now include defence, security, weapons and ammunition, cryptology, security of information systems, gambling, private security, research against bio-terrorism, materials used for intercepting correspondences and conversations, dual use technologies, energy (gas, electricity, hydrocarbons), water, transport, electronic communications, vital construction works and public health.

<sup>58</sup> See Austrian Foreign Trade Act, s 25a.

<sup>59</sup> Ibid, s 25(2). This provision has not, however, been used to date.

<sup>60</sup> See *supra* n 22.

<sup>61</sup> This is the case in e.g., the UK, Belgium (although these regulatory notification requirements do not offer the Belgian authorities a possibility to intervene in a merger or acquisition on "non-competition" grounds) and the Netherlands (see e.g., Protocol between the Dutch Central Bank N.V. and the Dutch Competition Authority concerning concentrations within the financial sector during emergency situations, published in the Government Gazette on 3 January 2011). In the UK, the Industry Act 1975 also confers power on the Secretary of State to prohibit changes of control over an important manufacturing undertaking where that the change of control would be contrary to the interests of the United Kingdom, or any substantial part of it. This power has never been exercised, however.

<sup>62</sup> See e.g., Health Care (Market Regulation) Act, Art 49a.

<sup>63</sup> Italian Antitrust Law, s 20.

interest exercising control might take action that threatens to impair the national security”.<sup>64</sup> Anxieties about Japanese, UK, Chinese and other foreign investment have, especially post-9/11, frequently led to political firestorms and calls by Members of Congress and other relevant stakeholders for the Committee on Foreign Investment in the United States and the President to protect national defence, critical infrastructure and technology by exercising this power. Further, in 2014 legislation was proposed to expand the types of investment subject to national security review and to subject certain foreign investment to a “net benefit” test.<sup>65</sup> In Canada, the Investment Canada Act 1985 confers broad powers on the Government to review whether certain direct acquisitions of control by a non-Canadian of a significant Canadian business is likely to be of net benefit to Canada<sup>66</sup> and in China, there is an overlap between the national security review, the mergers and acquisitions review conducted under the Chinese Anti-Monopoly Law (“AML”) and the foreign business licensing process. Indeed, as MOFCOM plays a role in the national security and foreign business licensing processes and must consider industrial policy and national security along with competition issues under the AML, “there is often suspicion among the international business community that MOFCOM applies the AML to protect domestic industries from foreign competition”.<sup>67</sup>

In addition to actually having these types of powers, it is clear that Governments frequently face intense pressure from politicians, business, private interest groups and the public, to exercise, or extend, them and so to protect the national or public interest. The issues are frequently hotly debated in the media which may serve to escalate public fear (especially of FDI from certain jurisdictions) and to reinforce and strengthen the importance of views expressed so, arguably, making it harder for a Government to ignore and resist them.<sup>68</sup> Indeed, it seems likely that in some cases Governments may feel pressure to respond to expressed public concern for short-term political purposes (in particular to protect their own popularity and their own interest in re-election). Where they do so respond, intuitive and emotional responses may be

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<sup>64</sup> See eg Exon-Florio amendments of Omnibus Trade and Competitiveness Act of 1988.

<sup>65</sup> See on the current US regime e.g., I Knable Gotts, “Transaction Parties Need to Consider Foreign Investment Laws as Part of Pre-Deal Planning” (2014) *Annual Proceedings of the Fordham Competition Law Institute* forthcoming and A Zhang, “Foreign Direct Investment from China: Sense and Sensibility” (2014) 34(3) *Northwestern Journal of International Law & Business* 395. Although the President’s decisions on the merits are not judicially reviewable, the DC Circuit held in Docket No 13-5315, *Ralls Corporation v Committee on Foreign Investment in the United States*, 15 July 2014, that where the President intends to suspend or prohibit a transaction, the affected parties must be afforded certain due process rights, in particular, notice of the intended action, access to the underlying unclassified evidence and a meaningful opportunity to rebut that evidence.

<sup>66</sup> Although between 2009-2014 all but one deal reviewed under this procedure were approved, the Act was relied upon to block BHP Billiton’s bid for Canada’s Potash Corporation of Saskatchewan Inc in 2010, see e.g., CS Goldman, MS Koch, “The Interface between Competition Law and Foreign Investment Merger Reviews: Flying Blind or with Radar?” (2014) (2014) *Annual Proceedings of the Fordham Competition Law Institute* forthcoming.

<sup>67</sup> Zhang, n 65. See also e.g., South Africa, where the legislation specifically permits social and political factors, such as employment and black economic empowerment, to be taken into account in merger review.

<sup>68</sup> There may be asymmetries which mean that it is much harder for the beneficiaries of the acquisition and the foreign acquirer to make their views heard, Chisholm, n 6, 12.

permitted to trump careful longer-term cost and benefit analysis of the transaction.<sup>69</sup> Further, because decision-taking under public interest regimes becomes less transparent and predictable, businesses and bidders may not have confidence in the regime and transactions may be deterred.<sup>70</sup>

In May 2014, for example, the UK Government came under intense pressure to intervene to influence the outcome of a proposed takeover of UK pharmaceutical firm, AstraZeneca, by US company, Pfizer. The British media reported extensively on the question of whether the merger would pose a significant threat to the UK economy and national interest and whether a commitment by Pfizer to retain 20% of the combined group's research and development ("R&D") workforce in the UK and to maintain R&D in the UK would be of sufficient value to allay any such national concerns.<sup>71</sup> Although at first the Government appeared neutral toward the deal,<sup>72</sup> public concern and political debate about the merger mounted,<sup>73</sup> leading the Government to cautiously explore the question of whether a public interest intervention might be feasible.<sup>74</sup> In the end no decision had to be taken immediately as

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<sup>69</sup> For the view that heuristics and cognitive biases influence public perception and may lead to irrational policy responses, see Zhang, n 65. See also SPEECH/11/561, n 29, of J Almunia who, when discussing the relations between merger control, global investments and cross-border integration, stressed that although advocates of foreign investment control, who express fear that a foreign owner will move technology and employment outside of Europe (but at times conceal a request for protectionist measures), might encourage populist politicians, he considered these arguments to be weak bases for policy-making; "A responsible policy-maker needs to see good evidence, not anecdotes".

<sup>70</sup> This was arguably a problem with the UK regime prior to the EA coming into force, see *supra* n 47 and could provide strong arguments for not introducing national measures which permit politicians to intervene on public interest grounds, see Chisholm, n 6, 11.

<sup>71</sup> See e.g., <http://www.dailymail.co.uk/news/article-2625719/Pressure-grows-David-Cameron-intervene-Pfizer-bid-survey-reveals-public-wants-ministers-step-in.html>. There was concern that commitments would prove meaningless, as had been the commitments given by Kraft prior to its acquisition of Cadbury. In this case days after its takeover of Cadbury, Kraft is alleged to have reneged on its promise, given prior to the takeover, that it would keep Cadbury's UK plant open (instead it moved production to Poland). For the view that availability heuristics (whereby people judge the frequency of events by reference to the ease by which instances can be brought to mind) suggests that frequently publicised events are perceived to be probable, see Zhang, n 65.

<sup>72</sup> Believing that it would, if accepted by shareholders, allow beneficial inward investment into Britain and act as a signal as to the strength of the British economy and its attractiveness as a place to do business.

<sup>73</sup> In particular, anxiety was expressed that it was likely to have a distracting and disruptive impact on AstraZeneca's business and would have a devastating impact on British jobs, research capabilities and R&D in the life science sectors. Lord Heseltine, adviser on economic growth to David Cameron, used the case as a basis for arguing that Britain needed, in step with other major economies, to build up its legal defences against foreign takeovers, especially ones which might impact on long-term industrial capabilities in the UK. The opposition party also advocated the need for broader public interest powers to be incorporated into the EA and suggested that it would move to block the deal if it had not yet closed, and it was in power, following the 2015 general election. It was the Labour Government, however, which, precisely to make the regime independent of government, in 2002 removed Ministers from decision making about mergers, apart from in a few specified public interest areas.

<sup>74</sup> By expanding the public interest grounds set out in the EA by Order, see *supra* n 48 (although the impact of the deal on incentives to innovate would be relevant to a competition law assessment under merger rules, see Chisholm, n 6, 12).



a number of factors<sup>75</sup> eventually combined to contribute to the bid failing.<sup>76</sup> Nonetheless, the UK Government subsequently considered whether it should expand the category of public interest factors set out in the EA (to include the protection of R&D and the UK science base or to permit intervention in cases which are very clearly against the national interest) and importantly (a matter which received limited attention in the media coverage at the time), whether any such expansion, would be compatible with EU law.<sup>77</sup>

At about the same time as the Pfizer/AstraZeneca case was being considered, a separate debate was raging in France over the risks (competition and otherwise) created by competing bids for train and gas turbine manufacturer. The French Government was so concerned about GE's contemplated acquisition of Alstom's energy business and to ensure that French companies should not become "prey", that it promoted an alternative deal with German company Siemens and supported the enactment of a new decree on foreign investments expanding the circumstances in which investments in specified strategic sectors require authorisation from the Ministry of Economy.<sup>78</sup> When GE's bid eventually prevailed (in a very altered form) over that of Siemens', the French Minister of Economy called for changes to EU competition law to allow the creation of "champions".

In section C it is seen that these scenarios described are not isolated or exceptional occurrences. Indeed, there is evidence<sup>79</sup> that, rather than staying neutral, many Member States do rely on national law either (i) to prevent, oppose or control foreign merger attempts to acquire businesses registered in their state, especially previously SOEs operating in industries such as "the banking, defen[c]e, energy, postal, telecommunications, transport, and water sectors"<sup>80</sup> and/or (ii) to support domestic ones that create "national champions"<sup>81</sup> or companies that are "too-big-to-be-acquired"<sup>82</sup> – through the grant of state aid or the promotion of national champions in

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<sup>75</sup> Including, it seems, the media-storm, the Government's concerns and AstraZeneca's shareholders unwillingness to engage with, and be persuaded by, the offers made, contrast AbbeVie's proposed acquisition of Shire, which broadly sidestepped and avoided the same acute media and public scrutiny and political resistance.

<sup>76</sup> Under UK rules, Pfizer was precluded from publicly bidding again for AstraZeneca until November 2014.

<sup>77</sup> See *infra* C.2.d, especially n 148 and text.

<sup>78</sup> This added to an already expansive list of sectors subject to the authorisation system, see *supra* n 56. The decree was stated to be intended to encourage foreign investors to enter into alliances with French companies, rather than to acquire them.

<sup>79</sup> S Dinc and I Erel, "Economic Nationalism in Mergers & Acquisitions" (2013) 68 *Journal of Finance* 2471

<sup>80</sup> See *infra* section C and A Nourry and N Jung, "EU State Measures Against Foreign Takeovers: 'Economic Patriotism' in All But Name" (2006) 2(2) *Competition Policy International* 99. See also M Harker, "Cross-Border Mergers in the EU: The Commission v The Member States" [2007] 3(2) *European Competition Journal* 503 and Nourry and Jung, n 8.

<sup>81</sup> See *infra* C.2.d and E.

<sup>82</sup> Dinc and Erel, n 79. See also e.g., Nourry and Jung, n 80.

preference to foreign takeovers and the clearance of such transactions.<sup>83</sup> Further, that government reactions against merger attempts are not pure posturing, but may have both a direct and/or indirect impact on the outcome of a case; both through decreasing the likelihood of an opposed merger's success and deterring future foreign acquirers; "nationalist reactions by the governments affect the working of the market economy significantly".<sup>84</sup>

## **C. PROTECTING THE "PUBLIC INTEREST": BALANCING NATIONAL AND EU LAW**

### **1. THE RELATIONSHIP BETWEEN EU AND NATIONAL LAW**

Given the broader powers of the Member States to take account of "non-competition" factors in their review of mergers and foreign investment, the capacity for such rules to derail transactions (which may have the potential to deliver efficiencies and benefit EU consumers) or to authorise the creation of national champions (which might threaten competition), the populist support that these public interest provisions often hold at the national level and the apparent willingness of some Member States at least to exercise their public interest powers, critical questions are: (1) when are Member States free to apply, or rely on, national law to prevent a foreign merger or acquisition or to support a domestic one on public interest grounds? (2) if a Member State can apply national law, can it apply such law freely or does EU law impose constraints on the adoption, or exercise, of such rules?; and (3) what happens if a Member State applies national law in breach of EU law – are the EU enforcement mechanisms sufficient to prevent violations and deter future ones?

In relation to (1) and (2), EU law does not preclude Member States from adopting or maintaining in force merger, regulatory or foreign investment rules so long as those rules do not encroach on the EU's exclusive competence within the fields of competition and FDI.<sup>85</sup> Such laws must, however, be compatible with, and exercised in a manner which is compatible with, EU law. In particular, Member States must not: enact or maintain national law which contravenes the rules on freedom of establishment or free movement of capital (see section C.2); or apply national laws to a merger where, to do so, would infringe the Treaties or the EUMR (see section C.3).

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<sup>83</sup> Where competing bids are made for a national company a Government may be able to intervene through, e.g., the offering of preferential terms or aid to a domestic bidder and/or through clearing a domestic bid, see *infra* C.2.d.iii and C.3. One study has suggested that nationalistic responses within the EU are affected by sociological and political factors: in particular, by the existence of stronger nationalist sentiments in a state, by the affinity the people in the target country feel towards the acquirer's country or the trust they have in it and by the strength or weakness of the government Dinc and Erel, n 79, s 7.

<sup>84</sup> Ibid, see also Harker, n 80.

<sup>85</sup> An interesting question, however, is exactly what EU's exclusive competence over FDI requires and how far it precludes Member States from acting in this area. As Member States are only able to legislate in areas of EU exclusive competence where empowered by the EU to do so (see *supra* n 21), an important issue is whether exclusive competence precludes Member States from adopting any laws which limit FDI into their States. Although Reg 1219/2012, n 22, seeks to provide a framework for the continuing existence of BITs (which will be progressively replaced by agreements of the Union) and for management of the relationship of these international treatment with the Union's investment policy, it makes no reference to Member States' internal foreign investment (or merger) laws.

These rules impose significant constraints on the autonomy of the Member States in this sphere.

In relation to (3), where a Member State does not adhere to these limitations, a number of mechanisms are in place to address infringements. Not only is a specific procedure set out in the EUMR (see section C.3),<sup>86</sup> but the Commission may act under the general procedure set out in Articles 258 and 260 TFEU,<sup>87</sup> which allows it to bring Member States which fail to fulfil their Treaty obligations before the Court of Justice (the “Court”) (see section D). In addition, Article 259 TFEU allows a Member State to bring an infringement proceedings against another Member State in breach of EU law (although this provision has seldom been used in practice) and private parties may be able to bring an action before a national court, for example, seeking a declaration that national law is incompatible with EU law and/or an injunction or damages in respect of a Member State’s “sufficiently serious” violation of EU law.

## **2. NATIONAL LAW MUST BE COMPATIBLE WITH EU LAW, IN PARTICULAR, THE RULES ON FREEDOM OF ESTABLISHMENT AND THE FREE MOVEMENT OF CAPITAL**

### *a. The internal market and the four freedoms: restrictions on establishment and capital movements*

By signing and ratifying the Treaties, the Member States are committed to the internal market “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”.<sup>88</sup> Consequently, all national laws contrary to those provisions are, even though adopted by democratically elected Governments, unlawful.

In this section it is seen that the rules on freedom of establishment and free movement of capital, in particular, impose limitations on the ability of the Member States to adopt any laws which put obstacles in the path of mergers or foreign investment within their jurisdiction. The rules on establishment apply to rules relating to shareholdings giving rise “to a certain influence on the decisions of the company and help to determine its activities.”<sup>89</sup> The capital rules apply to rules governing “those resources used for, or capable of, investment intended to generate revenue ... for example, cash, bonds and other debt instruments, and shares”,<sup>90</sup> including direct investment “in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control, and ‘portfolio’ investments, namely investments in the form of the acquisition of shares on the capital market solely with the intention of making a financial

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<sup>86</sup> EUMR, Art 21, see *infra* C.3.

<sup>87</sup> See generally A Albors-Llorens, “Judicial Protection before the Court of Justice of the European Union” in C Barnard and S Peers (eds), *European Union Law* (Oxford University Press, 2014), 261-264.

<sup>88</sup> TFEU, Art 26.

<sup>89</sup> L Flynn, “Free Movement of Capital” in Barnard and Peers, n 87, 451.

<sup>90</sup> *Ibid*, 448.

investment without any intention to influence the management and control of the undertaking”.<sup>91</sup>

As with the other rules governing free movement, the Court has interpreted both sets of provisions in a pro-integrationist way in order to give primacy to, and to facilitate the achievement of, these fundamental objectives of EU law. The pattern of the Court has been to interpret the concept of a “restriction” on any free movement broadly and the exceptions and justifications to the principle of free movement narrowly. This high impact approach means that almost all national rules affecting interstate trade<sup>92</sup> and creating barriers to the free movement of goods, services, persons, capital or to the right of establishment are liable to constitute a restriction, whether or not they are discriminatory (directly or indirectly) and specifically targeted at foreign goods, persons, services or investment.<sup>93</sup> Indeed, the concept of a restriction on the free movement of capital has thus been interpreted to cover not only a total ban on investment but prior authorisation or approval systems, systems conferring a power on the state to oppose a merger or acquisition<sup>94</sup> and any other measure which discourages or dissuades investment and affects access to the market even if the restriction does not discriminate as regards nationals and applies without distinction on grounds of nationality. The provision thus “goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial market”.<sup>95</sup> Similarly, the concept of a restriction on establishment encompasses all measures “which prohibit, impede or render less attractive the exercise of that freedom”.<sup>96</sup>

Consequently, EU control over national law is intense. The *very existence* of a restrictive rule is found to be incompatible with EU law unless the Member State can show that the measure is both (i) justifiable<sup>97</sup> (either on the basis of one of the specific Treaty-based exceptions or the Court-recognised justifications—the overriding requirements of public interest (see further section (c)) and (ii) proportionate (see section (d)). Many national laws are thus brought within the scope of EU law and the burden is shifted to the Member States to justify their law; the careful and nuanced balancing of the EU goal against the sensitive social and public policy choices made by the Member States takes place within the forum of the exception and justification framework.

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<sup>91</sup> Case C-171/08, n 3, para. 49. Capital movements thus mean any of the following when carried out on a cross-border basis: FDI; real estate investments or purchases; securities investment; granting of loans and credits; and other operations with financial institutions, see the nomenclature annexed to Council Directive 88/361/EEC [1988] OJ L178/8. See also n 3.

<sup>92</sup> Although the capital rules also apply where there is restriction on the free movement of capital between Member States and third countries, the Court has been more willing to recognise exceptions in this sphere, see *infra* C.2.d.ii.

<sup>93</sup> See C Barnard, “Restricting the Restrictions: lessons for the EU from the US” [2009] 68(3) *Cambridge Law Journal* 563.

<sup>94</sup> Case C-32/07, *Commission v Italy* [2009] ECR I-2291.

<sup>95</sup> Case C-98/01, *Commission v UK* [2003] ECR I-4641, para 43.

<sup>96</sup> Case C-442/02, *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-8961, para 11.

<sup>97</sup> In some circumstances derogations may be provided for in harmonising EU legislation.

b. *Exceptions and justifications*

The Treaty-based exceptions to the free movement provisions are not identical for all of the four freedoms but have similarities and overlaps (all for example, set out public policy and public security grounds). In relation to capital, important Treaty exceptions are set out in Article 64(1), which permits grandfather restrictions – the continued application of direct investment restrictions with regard to third countries in existence at the end of 1993<sup>98</sup> – and Article 65(1)(b) TFEU. The latter provides that Member States can take measures to prevent infringement of national law and regulations, in particular in the fields of taxation and prudential supervision of financial institutions and to protect themselves from proposed foreign investments which would pose a legitimate public policy or security concern, so long as the measure does not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital.<sup>99</sup> In relation to establishment, the Treaty provides derogations on the grounds of public policy, public security and public health.<sup>100</sup> More generally, Article 346(1)(b) TFEU provides that the Treaties shall not preclude the application by a Member State of measures “it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material”.

Given the resemblance of some of the derogations set out in the capital and establishment rules to those set out in the other free movement provisions,<sup>101</sup> the Court draws heavily on that jurisprudence in interpreting them where they correspond. It is seen in the sections below that the outcome of the individual cases are very fact specific but, as with these other derogations, the exceptions to the capital/establishment rules are “...interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions”;<sup>102</sup> the measures must not pursue purely economic ends; persons affected must be afforded legal protection; and the principle of proportionality must be respected.<sup>103</sup> In addition, the principle of legal certainty requires that clarity must be provided as to how the provisions will be exercised; individuals must be appraised of the extent of their rights and obligations.<sup>104</sup>

The public policy or security exceptions set out in the Treaty overlap with the Court developed requirements of public interest which allow Member States to “pursue, in a non-discriminatory way, an objective in the public interest ... if they observe the

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<sup>98</sup> Or 1999 for Bulgaria, Estonia and Hungary, see also TFEU, Art 66.

<sup>99</sup> TFEU, Art 63(3).

<sup>100</sup> TFEU, Art 52.

<sup>101</sup> The rules on free movement of goods (TFEU, Art 36) and free movement of capital set out the most expansive list of grounds for derogation.

<sup>102</sup> See e.g., Case C-54/99, *Association Eglise de Scientologie de Paris v The Prime Minister* [2000] ECR I-1335, para 17, Case C-503/99, *Commission v Belgium* [2002] ECR I-4809, para 47, Case C-483/99, *Commission v France* [2002] ECR I-4781, para 48 and Case C-463/00, *Commission v Spain* [2003] ECR I-4581, para 72.

<sup>103</sup> Case C-54/99, *ibid*, paras 17-18.

<sup>104</sup> *Ibid*, para 22.

principle of proportionality, that is if the same result could not be achieved by other less restrictive measures”.<sup>105</sup> The Court thus permits Member States to *submit* arguments on any public interest ground when justifying a rule which is *not* discriminatory; discriminatory rules, in contrast, must satisfy one of the Treaty exceptions and are harder to defend.<sup>106</sup>

*i. Public security or public order*

In a series of cases dealing with *Golden Shares* (where the Court confirmed that a holding of a golden share, which allows a State to control investment in, and management of, privatised strategic industries, constitutes a restriction<sup>107</sup>) the Court has clarified that a Member State might be justified in retaining influence over a shareholding in order to ensure a minimum supply of, or continuity in, “services in the public interest or strategic services”,<sup>108</sup> such as post, petroleum, electricity and telecommunications.<sup>109</sup>

In *Belgian Golden Shares*,<sup>110</sup> for example, the Court found, following *Campus Oil*,<sup>111</sup> that the measures in place, essentially allowing the authorities to oppose investment which was contrary to guidelines on the country’s energy policy, were suitable and did not go beyond what was necessary to obtain the objective of safeguarding energy supplies in the event of a crisis and so fell within the public interest and public security justification set out in Article 65 TFEU.<sup>112</sup>

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<sup>105</sup> Cases C-519/99 etc *Reisch* [2002] ECR I-2157.

<sup>106</sup> Although the distinction between discriminatory and non-discriminatory still stands, “it has become increasingly difficult to sustain the veracity of that distinction by reference to the case law practice”, see N Nic Shuibhne, “Exceptions to the free movement rules” in Barnard and Peers n 87, 482.

<sup>107</sup> Commencing with Case C-58/99 *Commission v Italy* [2000] ECR I-3811, see *infra* C.2.d.i (under these rules the Member State acted as a regulator in the guise of a market participant, see C Barnard, n 26).

<sup>108</sup> Case C-367/98, *Commission v Portugal* [2002] ECR I-4731, paras 47-48, but not where acting purely to protect to that state’s own financial or economic interests, see *infra* nn 131-133 and text

<sup>109</sup> In Case C-463/00, n 102, para 71, the Court held that neither commercial banking nor the supply of tobacco constituted public services, so golden shares held in these sectors would be incapable of justification, but see also *infra* C.2.b.ii. In 1997 the Commission published a Communication setting out its view that golden shares conferring special rights which discriminated against foreign investors would automatically infringe the Treaty, whilst non-discriminatory measures would be permitted only provided they were proportionate and pursued stable and objective criteria in the general interest, see Communication of the Commission on Certain Legal Aspects Concerning Intra-EU Investment [1997] OJ C220/15.

<sup>110</sup> Case C-383/98, *Commission v Belgium* [2002] ECR I-4809.

<sup>111</sup> Case 72/83, *Campus Oil* [1984] ECR 2727.

<sup>112</sup> Case C-383/98, n 110, para 49. The scheme required the authorities to oppose rather than to authorise the arrangements and so preserved “the principle of respect for the decision-making autonomy of the undertakings”. An *ex post facto* opposition system is less restrictive than a system of prior approval and is more likely to be found to be proportionate, *infra* C.2.c. In sum, the Belgian legislation was targeted as to when it applied and involved a form of targeted intervention by the public authorities. Intervention was limited, any decision had to be supported by a formal statement of reasons and was subject to effective review by the courts.

In *French Golden Shares*,<sup>113</sup> in contrast, the Court rejected the French Government's argument that its golden share in petroleum company, Elf-Aquitaine (requiring the Minister for Economic Affairs to give prior authorisation before an individual was entitled to hold share capital exceeding specified ceilings), was necessary to protect public security and to prevent an interruption of supply of petroleum products which were of fundamental economic and strategic importance to the country. Although the Court was willing to accept (again in line with long-standing jurisprudence such as *Campus Oil*) that security of energy supplies comes within the scope of public security, it stressed that the public security exception was applicable only if there was a "genuine and sufficiently serious threat to a fundamental interest to society".<sup>114</sup> It had to be ascertained therefore whether the rules at issue provided assurance within the Member State concerned, in the event of a genuine and serious threat, that there would be a minimum supply of the services and do not go beyond what is necessary for that purpose. On the facts, it held that the French legislation provided no precise objective and non-discriminatory criteria for authorisation or for determining how the national interest would affect the decision. Without such guidance on the objective circumstances in which prior authorization would be granted or refused, the court considered that the system would be contrary to the principle of legal certainty and would negate the principles of free movement completely. Specific, objective circumstances in which discretion may be exercised to protect the public interest identified were thus required.

The cases thus support the view that overly-broad public interest tests will lead to a lack of transparency and coherence in decision-taking and create uncertainty for investors which will deter exercise of free movement rights.<sup>115</sup>

## ii. Other public policy justifications

The list of Court-recognised public interest exceptions are not closed (it is open-ended). Nonetheless, a State will have to do more than make generic references to the strategic importance of an industry. There are a large number of cases dealing with public policy justifications which have been reviewed by the EU Courts in the free movement context. That case-law suggests that, in free movement of capital and freedom of establishment cases, measures designed to protect the following might be acceptable:<sup>116</sup>

- the values of a state or civil liberties (such as the promotion of EU R&D,<sup>117</sup> maintaining press diversity,<sup>118</sup> the risk of seriously undermining the financial

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<sup>113</sup> Case 483/99, n 102.

<sup>114</sup> Ibid, para 48.

<sup>115</sup> See also *supra* B.2.

<sup>116</sup> See Barnard, n 26, Chaps 13 and 15.

<sup>117</sup> See Case C-39/04, *Laboratoires Fournier* [2005] ECR I-2057, para 23 and further discussion of the case *infra* n 148 and Case C-10/10, *Commission v Austria* [2011] ECR I-5389.

<sup>118</sup> Case C-368/95, *Vereinigte Familiapress Zeitungsverlags-und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.

balance of the social security system,<sup>119</sup> environmental protection,<sup>120</sup> or the need to achieve land and country planning objectives in relation to the acquisition of land, such as maintaining a permanent population or preserving agricultural communities);<sup>121</sup>

- third parties (such as the protection of public health, prudential rules,<sup>122</sup> creditors, minority shareholders, investors, workers,<sup>123</sup> the reputation or stability of the banking sector,<sup>124</sup> the need to ensure road safety<sup>125</sup> or consumer protection<sup>126</sup>); or
- socio-cultural matters (such as the survival of small firms<sup>127</sup> or the promotion of tourism<sup>128</sup>).

In each case, the Court will scrutinise the legislation carefully and its objectives to determine whether the Member State is really acting to protect such an interest (rather than imposing a disguised restriction on trade). In practice, therefore, although the

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<sup>119</sup> Case C-158/96, *Kohll* [1998] ECR I-1931.

<sup>120</sup> Case 302/86, *Commission v Denmark* [1988] ECR 4607, para 9 and Case C-309/02, *Radlberger Getränkegesellschaft and S Spitz* [2004] ECR I-11763, para 75.

<sup>121</sup> Case C-302/97, *Konle* [1999] ECR I-3099.

<sup>122</sup> Case C-39/11, *VBV* 7 June 2012.

<sup>123</sup> Case C-112/05, *Commission v Germany (VW)* [2007] ECR I-8995.

<sup>124</sup> Case C-384/93, *Alpine Investments BV v Minister van Financien* [1995] ECR I-1141, para 44. See also Commission Press Release IP/13/298.

<sup>125</sup> Case C-55/93, *van Schaik* [1994] ECR I-4837, para 19 and Case C-54/05, *Commission v Finland* [2007] ECR I-2473, para 40.

<sup>126</sup> See e.g., Case 220/83, *Commission v France* [1986] ECR 3663, para 20 and Case C-393/05, *Commission v Austria* [2007] ECR I-10195, para 52.

<sup>127</sup> Case C-464/05, *Geurts and Vogten* [2007] ECR I-9325, paras 25-27 (“it is conceivable that such considerations, in particular those connected with the survival of small and medium-sized undertakings and the maintenance of employment in them, may, under certain circumstances and conditions, be acceptable justifications for national legislation providing for a tax benefit for natural or legal persons,” but on the facts the Belgian Government had “not been able to show the need to limit the exemption at issue to ‘family’ undertakings which maintain a given number of jobs in the territory of the Member State concerned. In the present case, in relation to the objective of preventing inheritance tax from jeopardising the continuation of family undertakings, and therefore the jobs which they bring, undertakings having their seat in another Member State are in a situation comparable to that of undertakings established in the first Member State”).

<sup>128</sup> Case C-338/09, *Yellow Cab Verkehrsbetriebs GmbH v Landeshauptmann von Wien* [2010] ECR I-13927, paras 50-51 (in this case the Court accepted that the operation of a bus service may serve an objective in the general interest, such as “promotion of tourism, road safety by channelling tourist traffic to set routes, or protection of the environment by offering a collective mode of transport as an alternative to individual means of transport” but that the objective “of ensuring the profitability of a competing bus service, as a reason of a purely economic nature, cannot, in accordance with the settled case-law, constitute an overriding reason in the public interest”, relying on Case C-384/08, *Attanasio Group* [2010] ECR I-2055, para 55).



Court may accept a potential justification in principle, it may find on the facts that it has not been established that the measure was designed to achieve that objective.<sup>129</sup>

*iii. Purely economic reasons*

In examining public interest justifications, the Court has consistently stressed that purely economic justifications, or financial concerns cannot be relied on to substantiate a restriction of a fundamental freedom. Such justifications would undermine the internal market objective. “Extending equal opportunities to the nationals of other Member States ... costs money”.<sup>130</sup> In *Commission v Portugal*<sup>131</sup> the Court reiterated that unless the justification clearly fell within one of the specified exceptions in relation to tax law under Article 65, “the general financial interests of a Member State cannot constitute adequate justification. It is settled case-law that economic grounds can never serve as justification for obstacles prohibited by the Treaty ...”.<sup>132</sup> Consequently, it rejected the Portuguese Government justifications based on economic policy objectives, “namely choosing a strategic partner, strengthening the competitive structure of the market concerned or modernising and increasing the efficiency of means of production.”<sup>133</sup> As such interests were held not to constitute a valid justification for restrictions on the fundamental freedom concerned the Court held that the prior authorisation system created by the Portuguese golden share did not comply with the freedom of capital rules and that by adopting and maintaining in force the legislation the Portuguese Republic had failed to comply with its Treaty obligations.<sup>134</sup>

In other cases the court has also rejected economic objectives raised, for example, the rationalisation of services provided by service stations,<sup>135</sup> promoting the economy of a country by encouraging investment in companies with their seat there,<sup>136</sup> measures designed to prevent the reduction of tax revenue,<sup>137</sup> measures designed to achieve industrial peace<sup>138</sup> or protecting the competitive viability of a business). The distinctions drawn in the cases are fine ones, however, and at times justifications accepted “come close to the very type of economic justifications which the Court has rejected in other cases”.<sup>139</sup>

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<sup>129</sup> See e.g., Case C-112/05, n 123 and *supra* n 127.

<sup>130</sup> Nic Shuibhne, n 106, 487.

<sup>131</sup> Case C-367/98, n 108.

<sup>132</sup> *Ibid*, para 52

<sup>133</sup> *Ibid*.

<sup>134</sup> *Ibid*, paras 53-54.

<sup>135</sup> Case C-384/08, n 128. See also Case C-338/09, *Yellow Cab*, n 128

<sup>136</sup> Case C-35/98 *Verkooijen* [2000] ECR I-4071.

<sup>137</sup> Case C-464/02, *Commission v Denmark (company vehicles)* [2005] ECR I-7929.

<sup>138</sup> C-398/95, *SETTG v Ypourgos Ergasias* [1997] ECR I-3091.

<sup>139</sup> Barnard, n 26, 533.

c. *Proportionality*

Even if a legitimate justification is raised, the Court demands that the measures are proportionate to the aim. For example, the Court has consistently taken the view that an ex ante authorisation system will be proportionate only if an ex post objection or declaration system or other measures is not sufficient to achieve the objective pursued. The proportionality principle is thus applied rigorously to ensure that derogations from the free movement principles are limited to what is absolutely required; where alternatives exist, the measure chosen should be objectively the least restrictive to achieve the end pursued.

d. *Implications for the Member States' merger control, foreign investment or regulatory laws*

i. *Obstacles to intra-Union cross-border mergers*

The discussion in the sections above has important implications for the categories of national law discussed in section B above. Member States may not adopt, maintain in force or apply national laws which contravene establishment and/or capital rules.

The wide interpretation adopted of a “restriction” will it seems capture most of the rules described which require prior approval or authorisation for, or provide the opportunity to oppose or put other obstacles in the path of, a foreign merger, acquisition of shares or other investment in a company even if they are not specifically targeted at foreign investors. This conclusion is supported by the approach of the Court in the *Golden Share* cases. In *UK Golden Shares*,<sup>140</sup> for example, the Court held that rules in a privatised company’s articles of association which prevented any investor acquiring shares in that firm carrying the right to more than 15 per cent of the votes without the consent of the Government, did restrict both the freedom of capital and freedom of establishment even though they applied without distinction to both UK residents and non-residents.<sup>141</sup> As they affected a person wishing to acquire a shareholding, they were liable to deter the access of investors from other Member States to the market and from making investments.

In *Church of Scientology*<sup>142</sup> the Court also held that a French rule subjecting foreign investment to a prior authorisation system constituted a restriction on the free movement of capital, in *Commission v Germany (VW)*<sup>143</sup> the Court held that a law capping the voting rights of shareholders and giving federal and state authorities power to participate in the activities of the supervisory board constituted a restriction and in *Commission v Kingdom of Spain*<sup>144</sup> the Court upheld the Commission’s view that Spanish rules requiring purchasers of more than a 10% shareholding in a

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<sup>140</sup> Case C-98/01, n 95, see also *supra* n 107.

<sup>141</sup> See also e.g., Case C-367/98, n 108.

<sup>142</sup> Case C-54/99, n 102.

<sup>143</sup> Case C-112/05, n 123. Proceedings brought by the Commission, seeking an order against Germany to pay financial penalties for failure to comply with this judgment were, however, dismissed; see Case C-95/12, *Commission v Germany* 22 October 2013.

<sup>144</sup> Case C-207/07, [2008] ECR I-111.

regulated entity to gain authorisation from the Spanish energy regulator were both liable to dissuade investors in other Member States from capital investments which would render the free movement of capital illusory and constituted a restriction on the right of establishment.<sup>145</sup> In Polish banks, the Commission also took the view that privatisation agreements prohibiting purchasers of shares from buying shares in competing banks in order “to safeguard the competitiveness of the Polish market in banking services”<sup>146</sup> violated the free movement rules.

Laws imposing “restrictions” to establishment or on the movement of capital must therefore be analysed to determine whether they are justified and proportionate (prior authorisation systems are likely to attract careful scrutiny).

It has been seen that the Court has accepted that a relatively wide-range of clearly articulated public interest justifications may be relied upon by Member States. Many of the examples of Member States’ laws discussed in section B above, appear to be designed to counter genuine and serious threats to legitimate public security or public policy objectives which are *prima-facie* justifiable, for example, prudential rules, rules designed to safeguard the plurality of the media or to protect national security, public order, defence or the security of supply of energy or transport. In addition, although there is no authority on this point, it seems that merger control regimes, providing for economics-based competition assessments, which impose obstacles to the right to establishment or free movement of capital are likely, where non-discriminatory, to be justifiable by reference to an overriding reason relating to the public interest on the basis that they are designed to protect the competitive structure of the market.<sup>147</sup>

Some of the laws however, appear to be more problematic. The jurisprudence makes it clear that rules designed solely to protect economic or financial interests of a Member State (such as employment in that State or the protection of a national industry or the retention of a specific R&D base within that individual Member State<sup>148</sup>) or which provide a generic ban on investment in companies operating in a broad category of sectors on grounds which are not clearly articulated (so the specific public interest to be protected is not identifiable) are not permitted.<sup>149</sup> Further, that if

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<sup>145</sup> See *infra* C.3.b.

<sup>146</sup> See IP/06/276, discussed further *infra* C.3.b.

<sup>147</sup> But see also *infra* C.3 (such national merger laws may not ordinarily be applied when the Commission has exclusive jurisdiction to assess the transaction under the EUMR).

<sup>148</sup> Although EU law permits action to protect identified concerns of public interest, which includes it seems the promotion of R&D in EU industry, the Court stressed in Case C-39/04, *Laboratoires Fournier* [2005] ECR I-2057, the promotion of R&D “cannot justify a national measure such as that at issue in the main proceedings, which refuses the benefit of a tax credit for any research not carried out in the Member State concerned. Such legislation is directly contrary to the objective of the Community policy on research and technological development which... is, *inter alia*, ‘strengthening the scientific and technological bases of Community industry and encouraging it to become more competitive at international level’...”. See also TFEU, Art 179.

<sup>149</sup> The legality of the broad French foreign investment decree adopted in 2014 (discussed *supra* nn 55-56 and text), has consequently been questioned, see e.g., A Gaudemet, “Investissements étrangers en France: le décret Montebourg est-il viable?”, available at <http://www.affiches-parisiennes.com/investissements-etranagers-en-france-le-decret-montebourg-est-il-viable-4271.html>. At the time of its adoption the Commission also indicated that it would review it

measures are too broad, they cannot be saved by a Member State committing not to operate the rules in a way which is incompatible with EU law; rather the mere existence of such rules creates uncertainty about the ability to exercise the right of free movement.<sup>150</sup> In *Church of Scientology*<sup>151</sup> the Court held that a system of prior authorisation for every FDI which represents a threat to public policy and public security without further definition, was contrary to the rules on free movement of capital. “Such a lack of precision does not enable individuals to be apprised of the extent of their rights and obligations deriving from Article [63 TFEU]. That being so, the system established is contrary to the principle of legal certainty.” National law must therefore provide clarity as to when a restriction will be applied and provide comfort that it will not be applied in a discriminatory manner.

ii. *Free movement of capital and third countries*

The cases discussed in the sections above have principally involved rules restricting inter-state trade or movement, and the removal of rules which create barriers to the creation of the internal market. It has already been noted, however, that a distinctive feature of the capital rules is that they also apply to restrictions on the movement of capital between Member States and third countries. Two vital questions<sup>152</sup> arising where national rules apply only to investors from third countries, or are invoked against them, are, therefore, (i) whether it is the freedom of establishment and/or free movement of capital rules which apply, since only the latter apply to third country investors; and (ii) where the capital rules are applicable, whether they operate in the same way in this context.

There is clearly a potential overlap between the capital and establishment rules as “freedom to move certain types of capital is, in practice, a precondition of the effective exercise of ... the right of establishment”.<sup>153</sup> The case-law, however, has not always been entirely clear as to whether, and if so when, one set of rules applies to the exclusion of the other, or whether, and if so when, both apply.

In a number of cases the two provisions have been applied together leading to a convergence of the tests to be applied. In some more recent cases, however, the Court has taken account of the purpose of the national legislation in determining whether it should be the establishment *or* capital provisions which apply. In *Scheunemann*,<sup>154</sup> for example, the Court held that national legislation which applies *only* to “shareholdings enabling the holder to exert a definite influence over a company’s decisions and

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carefully to ensure it did not cover a field so vast that any takeover would be subject to authorisation (which would amount to protectionism). See also e.g., the UK Industry Act, n 61 and *supra* n 47.

<sup>150</sup> Case C-367/98, n 108.

<sup>151</sup> See e.g., Case C-54/99, n 102, paras 21-23.

<sup>152</sup> But see also *supra* n 85.

<sup>153</sup> Case 203/80, *Criminal Proceedings against Guerrino Casati* [1981] ECR 2595. See also TFEU, Art 65(2) clarifying that the provisions on capital and payments are without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaty.

<sup>154</sup> Case C-31/11, *Marianne Scheunemann v Finanzamt Bremerhaven*, 19 July 2012.

determine its activities is covered by the Treaty provisions on freedom of establishment. On the other hand, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment, with no intention of influencing the management and control of the undertaking, must be examined exclusively in the light of the free movement of capital ...”.<sup>155</sup> This suggests that in order to determine which freedom applies, it is necessary to examine whether the shareholding referred to in the relevant national legislation is sufficient to enable the shareholder to exert a definite influence over the company’s decisions and to determine its activities.

In *Scheunemann*, the Court thus accepted that as the legislation at issue in the main proceedings primarily affected freedom of establishment, it fell solely within the scope of the Treaty provisions concerning that freedom.<sup>156</sup> “If it were to be found that such a national measure has restrictive effects on the free movement of capital, those effects would have to be seen as an unavoidable consequence of a restriction on freedom of establishment and would not justify an independent examination of that measure in the light of the Treaty provisions on the free movement of capital ...”.<sup>157</sup> The rules on capital did not thus apply and as the case related to a shareholding in a company which had its registered office in a *third country*, neither did the rules on establishment. Conversely, in *Portuguese Golden Shares*, the Court held that in so far as the national measures, which precluded both direct and portfolio investment, entailed restrictions on freedom of establishment, such restrictions were a direct consequence of the obstacles to the free movement of capital. As an infringement of the capital rules had been established there was no need for a separate examination of the measures at issue under the establishment rules.<sup>158</sup>

In another case, however, *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue (FII No 2)*,<sup>159</sup> the Court suggested that the hard division between freedom of establishment and capital may only be relevant to intra-EU situations, at least in certain tax cases.<sup>160</sup> Thus the capital provisions might apply not only to portfolio investments but also to cases of decisive influence where third country relations are at stake.

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<sup>155</sup> Ibid, para 23.

<sup>156</sup> The national rule applied to a shareholding of 25% in the capital of a company which gave the shareholder a blocking minority in the context of important decisions affecting the company.

<sup>157</sup> Case C-31/11, n 154, paras 28-30, relying on Case C-464/05, n 127, para 16. See also Case C-524/04, *Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue* [2007] ECR I-2107.

<sup>158</sup> Case C-367/98, n 108, paras 79-80. In Case C-157/05, *Winfried L. Holböck v Finanzamt Salzburg-Land* [2007] ECRI-4051, however, the Court held that where the case relates to legislation which does not only apply to stakes conferring a definite influence on a company’s decision the Court may apply both.

<sup>159</sup> Case C-35/11, 13 November 2013.

<sup>160</sup> See C Barnard and J Snell, “Free movement of legal persons and the provision of services” in Barnard and Peers, n 87, 411-412.

Where the capital rules do apply, the Court clarified in its important ruling in *Re A*,<sup>161</sup> that the concept of a restriction on the freedom of capital is interpreted in the same way whether the alleged restriction is on capital movements between Member States or between Member States and third countries. In so finding the Court denied the arguments of Germany and the Netherlands that such a holding would open up the EU market to non-EU/EEA investors without being able to guarantee equal liberalisation from such countries. Measures which impose obstacles to investment from third countries will therefore be prohibited by the rules on the free movement of capital unless a public interest justification, or statutory exception, can be relied upon. It is here, however, that Member States are currently afforded greater autonomy and latitude. Not only does Article 64(1) permit “grandfather” provisions,<sup>162</sup> but the Court has accepted that, given the different legal framework governing relations between Member States and between Member States and third countries, a restriction on free movement of capital might be acceptable in situations involving third countries when it would not be permitted in an intra-Union situation; the exceptions and public policy justifications might be interpreted more flexibly.<sup>163</sup> Given the relatively sparse volume of cases in this area, however, the exact scope of the permissible exceptions and justifications in relation to restrictions operating against third country investors and the extent to which the Commission would be prepared to bring proceedings in these cases is not entirely clear. It seems likely that both the Court and the Commission will proceed with caution in this delicate area. Further, the debate on this issue is likely to intensify if third countries, such as the US, Canada and China, become more willing to rely on foreign investment or other rules to block foreign M&A in their jurisdictions.

The position, at least in relation to some third countries, might also change if the EU negotiates BITs or trade agreements with investment chapters with some third countries; these international treaties would then provide a framework governing relations between Member States and those third countries.<sup>164</sup> It has been seen that it is possible that some of these agreements may incorporate pre-establishment obligations requiring each party to accord no less favourable treatment to investors of the other party than that it accords, in like circumstances, either to its own investors (a “national treatment” obligation) or to investors from other third countries. If such an obligation were included within an EU negotiated agreement, it would consequently require a Member State to open a sector which is open to national investors or investors from other third countries to foreign investors from the partner State unless an exception applies, for example, for national security or certain excluded sectors; this would clearly prevent EU Member States from acting purely (except in excluded sectors) to support and promote growth of domestic enterprises. As negotiations over these new trade Treaties progresses, the question of how they apply to pre-

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<sup>161</sup> Case C-101/05, *A* [2007] ECR I-11531, para 38 See more recently Case C-282/12, *Itelcar* 3 October 2013, para 30.

<sup>162</sup> See *supra* n 98 and TFEU, Arts 64(2)(3), 65(4), 66 and 75.

<sup>163</sup> See e.g., Case C-101/05, n 161 and Case C-446/04, *Test Claimants in the FII Group Litigation v Inland Revenue Commissioners* [2006] ECR I-11753, especially para 121.

<sup>164</sup> See *supra* n 30. In so far as the capital provisions apply, the BITs would presumably operate as harmonising measures which would shape the scope of the derogations.

establishment investment will consequently also be of vital importance to the autonomy of the Member States to limit investment from third countries.

*iii. Creation of national champions*

The establishment and capital rules are triggered only by restrictions. They do not, therefore, appear to preclude a Member State from exercising regulatory *approval* of mergers between domestic companies on public interest grounds (as is permitted in a number of Member States<sup>165</sup>), even if the application of such rules might result in the creation of a national champion at the expense of competition and the interest of consumer welfare within the EU. Regulatory approval in this way will be impermissible, however, if the merger transaction falls within the exclusive jurisdiction of the Commission under the EUMR (see section C.3 below).

### **3. NATIONAL LAW MUST NOT BE APPLIED IN BREACH OF THE EUMR**

*a. Introduction*

In addition to ensuring that they do not adopt or maintain in force laws contrary to the rules on free movement of capital and the freedom of establishment, Member States must also ensure that when *applying* national law to a merger transaction they do not infringe these principles or other EU law. In particular they must respect the jurisdictional provisions set out in the EUMR. Broadly, the EUMR allocates jurisdiction to appraise concentrations between the Commission and the Member States; large-scale concentrations which have a “Community” – or EU – dimension (based on certain turnover thresholds)<sup>166</sup> are as a general rule appraised exclusively by the Commission.

A Member States may *not* therefore ordinarily apply national legislation on competition to concentrations with an EU dimension; such concentrations benefit from a “one-stop shop” within the EU – an exclusive competition law assessment by the Commission – and should not be subject to a second control under national competition law. Two important exceptions to this principle apply, however. First, Member States may apply national competition law and take measures which are necessary “to safeguard or restore effective competition on the market concerned” where a concentration affects, or threatens to affect, competition in a “distinct market” and the merger, or aspects of it, are referred to it by the Commission under specific procedures set out in Article 4(4) or Article 9 EUMR.<sup>167</sup> Second, Member States may

<sup>165</sup> E.g., in Austria, France, Germany, Italy, Spain, the Netherlands and the UK, see *supra* B.2.

<sup>166</sup> EU dimension is assessed, under tests set out in EUMR, Art1(2)(3), by reference to the turnover of the parties involved; the tests are designed to draw bright lines and to be relatively simple and easy to apply. A feature of both Art 1(2) and (3) is that even if the stipulated global and EU turnover and other thresholds are met, EU jurisdiction is denied if the *proviso* applies—if each of the undertakings concerned in the merger achieves more than two-thirds of its EU turnover within one and the same Member State (the “two-thirds” rule), see *infra* E. The general rule is that concentrations without an EU dimension are assessed exclusively under national law; the Commission cannot apply either the EUMR or Articles 101 or 102 to the transaction, EUMR, Art 21(1), but see Arts 4(5) and 22.

<sup>167</sup> EUMR, Arts 9(8) and 4(4). Broadly, these provisions allow the notifying parties or a Member State to request referral of a concentration with an EU dimension, or aspects of it, to a Member State, see e.g., Jones and Sufrin, n 31, 1159-1164.

act to protect legitimate interests, not protected by the EUMR itself (i.e., “non-competition” interests).

*b. Protecting Legitimate Interests: Article 21(4) EUMR*

*i. The elements of Article 21(4)*

Article 21(4) provides that even where the Commission has exclusive jurisdiction over a concentration, “Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of [EU] law”. It clarifies that “public security, plurality of the media and prudential rules” are to be recognised as legitimate interests (“recognised interests”), and are compatible with EU law so long as the measures are proportionate and non-discriminatory. Actions adopted to protect these recognised interests may be adopted and enter into force without prior communication to, and approval from, the Commission.<sup>168</sup> In cases of uncertainty as to whether one of the recognised legitimate interests in Article 21(4) applies, or whether such measures conform with EU law,<sup>169</sup> however, or where a Member State wishes to act to protect “[a]ny other public interest”, the interest must “be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of EU law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication”.<sup>170</sup>

*ii. Implications for the Member States’ merger control, foreign investment or regulatory rules*

A number of features of Article 21(4) are observed which are of particular significance to the ability of Member States to act under national law in EU merger cases.

First, the Commission’s view is that Article 21(4) only permits a Member State to *prohibit* a concentration, or make it subject to additional conditions. This view is consistent with case-law holding that the principle of supremacy of EU law precludes a Member State from authorising a transaction which has been prohibited under the EU Treaty competition provisions.<sup>171</sup> A Member State cannot, therefore, as it can

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<sup>168</sup> Case M.4197, *E.ON/Endesa* (2006), para 25.

<sup>169</sup> See Case M.4197, *ibid*, para 56. Case M.1616, *BSCH/A.Champaliaud* (1999), para 66.

<sup>170</sup> Case M.1616, *ibid*, para 27.

<sup>171</sup> The principle of supremacy establishes that national law can be applied only in so far as its application does not “prejudice the full and uniform application of [EU] law or the effects of measures taken or to be taken to implement it”. Consequently, it has been held that neither an NCA nor a national court can authorise an agreement or conduct prohibited by EU law under national competition law or under any other provision of national law or according to a national act, see Case 14/68, *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1, paras 5-9. See also Commission’s “Notes on Council Regulation 4064/89”, available at [http://ec.europa.eu/competition/mergers/legislation/notes\\_reg4064\\_89\\_en.pdf](http://ec.europa.eu/competition/mergers/legislation/notes_reg4064_89_en.pdf) and J Faull and A Nikpay (eds), *The EU Law of Competition* (Oxford University Press, 3rd edn, 2014), 5.289.



where the EUMR does not apply,<sup>172</sup> rely on Article 21(4) to authorise a merger on public interest grounds.

Second, although Article 21(4) appears, at first blush, to accord considerable latitude to Member States in determining whether any interest they wish to protect pursuant to it is “legitimate”, in fact, on closer inspection, it limits the Member States’ autonomy considerably and only permits intervention in limited circumstances. First, it requires that if the interest to be protected is not one of the recognised interests, that it is a “public” interest which is not protected by the EUMR itself (it is not a “competition” interest<sup>173</sup>). Second, and crucially, it requires that measures taken to protect legitimate interests must be compatible with EU law (which includes Articles 49 and 63 TFEU). It has been seen that the establishment and capital provisions, impose substantial constraints on the ability of a Member State to prohibit, submit to conditions or prejudice investments through shareholding, mergers and acquisitions. An inextricable and important link thus exists between “legitimate interests” within the meaning of Article 21(4) and the exceptions and justifications to the free movement of capital and freedom of establishment rules. If the “restriction” on capital and/or establishment envisaged by the Member State under Article 21(4) does not fall within one of the exceptions or justifications to the relevant free movement rules it will not be permitted under Article 21(4). Either the legislation itself and/or the exercise of the measure will be incompatible with EU law; the legitimate interest pursued must therefore constitute a valid public interest justification.

The close link between the concept of legitimate interest under Article 21(4) and the exceptions and justifications to the free movement provisions is reinforced by the fact that the recognised interests include “public security”, “plurality of the media” and “prudential rules”, concepts whose specific meaning have been developed under EU free movement law. In a number of cases the Commission has thus accepted that Member States may take action to protect: defence policy or military security<sup>174</sup> (the Member States are also have a general right set out in Article 346 TFEU<sup>175</sup> to act to

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<sup>172</sup> See *supra* C.2.d.iii.

<sup>173</sup> See discussion of the Polish banks case, *infra* especially n 193 and text.

<sup>174</sup> See e.g., Case M.1858, *Thomson CSF/Racal (II)* (2000) (impacting on defence electronics markets), Case M.336, *IBM France/CGI* (1993) (involving IT businesses, including hardware, software and services), Case M.3418, *General Dynamics/ Alvis* (2004) (involving British armoured combat vehicles), Case M.3559, *Finmeccanical/Agusta-Westland* (2004), Case M.3720, *BAE Systems/ AMS* (2005) (involving defence and commercial aerospace systems and BAE’s communications and avionics business) and Case M.4561, *GE/Smiths Aerospace* (2007) (involving Smiths Groups’ aerospace division).

<sup>175</sup> Set out *supra* C.2.b. EUMR, recital 19 makes it clear that the regulation (and in particular Article 21(4)) does not affect a Member State’s ability to act under this TFEU, Art 346. A list of arms referred to by TFEU, Art 346 was adopted by the Council (Decn 255/58), see V Rose and D Bailey (eds) *Bellamy & Child: European Union Law of Competition* (Oxford University Press, 7th edn, 2014), Vol II, A7). When acting under TFEU, Art 346, Member States, instead of acting in addition to the Commission under the EUMR (as is the case under Article 21(4) EUMR), have generally instructed firms not to notify the exclusively military aspects of the deal to the Commission at all, see e.g., Case M.528, *British Aerospace/VSEL* (1994) and Case M.529, *GEC/VSEL* (1994). If the Commission considers that a Member State is making improper use of these powers it may take the matter directly before the Court under TFEU, Art 348.

protect national security issues); maintenance of diversified sources of information, plurality of opinion and a multiplicity of views in media markets;<sup>176</sup> or safeguarding “prudential rules” (aiming to ensure, for example, capital adequacy requirements (solvency) and the good repute and honesty of those running the company concerned).<sup>177</sup> By analogy with the free movement rules, it also seems that public security would encompass proportionate measures to counter a genuine and sufficiently serious threat to the security of supplies of a product or service which is of fundamental importance for the existence of, or survival of those in, that Member State (such as oil, gas, water, electricity, telecommunications)<sup>178</sup> or of vital or essential interest for the population’s health.<sup>179</sup>

Article 21(4) does not therefore, it seems, confer new rights on Member States, but articulates their inherent powers to impose, subject to EU law, obstacles to investment, or make it subject to additional conditions and requirements, on the basis of public interests grounds. In this case, however, the public interest grounds must be other than those covered by the EUMR.<sup>180</sup>

Third, in order to prevent Member States acting autonomously in this area and to ensure the *effet utile* of the EUMR and Article 21(4), non-recognised interests must be notified to the Commission; the notification and standstill procedure thus prohibits Member States from implementing any such measure until the Commission determines whether the interest is legitimate.

Fourth, a particular problem which has occurred in a number of cases is that in spite of the notification and standstill obligation there are instances in which a Member State has acted without notifying the Commission, in circumstances where the Commission believes that the conditions of Article 21(4) are not satisfied and so that the Member States is acting in breach of that provision, the EUMR and other EU law. An important ruling therefore is *Portuguese Republic v Commission*,<sup>181</sup> where the Court confirmed the Commission’s view that, even if no communication is made by the Member State to the Commission, the Commission is, still entitled to adopt a

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<sup>176</sup> See e.g., Case M.423, *Newspaper Publishing* (1984) and Case M.5932, *NewsCorp/BSkyB* (2010), paras 304-309.

<sup>177</sup> See the Commission’s “Notes on Council Regulation 4064/89”, n 171 (prudential interests should be understood to cover e.g., measures to ensure the good repute of individuals managing such undertakings, the honesty of transactions and the rules of solvency) and M.1724, *BSCH/A.Champalimaud* (1999), para 36 (EU harmonising provisions should also be taken into account to determine the EU notion of prudential interest which should include interests protected by harmonising directives). See also e.g., Case M.759, *Sun Alliance/Royal Insurance* (1996), paras 16-17.

<sup>178</sup> See Case 72/83, n 111. In Case M.567, *Lyonnaise des Eaux SA/Northumbrian Water Group* (1996) for example, the Commission accepted, following a notification from the UK, the right for the UK authorities to apply the provisions of the Water Industry Act to the concentration to protect public security. Contrast Case M.1346, *Edf/London Electricity* (1999) (no need for a derogation under Article 21(4) IP/99/49).

<sup>179</sup> See the Commission’s “Notes on Council Regulation 4064/89”, n 171, and discussion *supra* section C.2.b.

<sup>180</sup> See *supra* n 147.

<sup>181</sup> Case C-42/01, *Portuguese Republic v Commission* [2004] ECR I-6079.

decision under Article 21 assessing whether measures taken by a Member State are compatible with Article 21(4) and requiring a Member State to withdraw measures which it decides are not. This means that the Commission is not obliged, immediately, to have recourse to procedures set out in Article 258 TFEU. Otherwise, Member States could easily avoid the scrutiny of the Commission by not communicating such measures and national measures could irretrievably prejudice a merger with an EU dimension.<sup>182</sup> In practice therefore, where the Commission believes that a Member State has violated the exclusivity provisions of the EUMR, it communicates this preliminary view to the Member State and gives it a chance to respond, before issuing an Article 21 decision. Only if a Member State fails to comply with that decision, will the Commission have to start the procedure under Article 258.

The Commission has used this procedure in a number of cases where it has taken the view that a Member State is imposing obstacles to a merger on grounds which are not designed to protect legitimate interests. For example, it went into (lengthy) battle with the Spanish authorities over their actions in relation to competing bids for Spanish electricity operator, Endesa. The background to the case was that the Commission had cleared E.ON's and ENEL/Acciona's respective bids under the EUMR<sup>183</sup> (a third bid (which was supported by the Spanish Government) by Spanish Gas Natural, did not have an EU dimension and was appraised by the Spanish competition authorities<sup>184</sup>). Nonetheless, the Spanish authorities imposed conditions on the potential investors under powers which required those acquiring significant influence in a company active in a regulated sector to obtain prior approval for the transaction. Not only did the Commission pursue proceedings against Spain under Article 21 EUMR in relation to the measures adopted in relation to these particular bids, but it opened an infringement procedure under Article 258 TFEU, in relation to the legislation on which the authorities had relied.<sup>185</sup>

In the Article 21 EUMR decisions,<sup>186</sup> the Commission found that the actions were not justified by a need to protect the security of supply risks alleged and were contrary to the capital and establishment provisions and required Spain to withdraw them without delay;<sup>187</sup> public security could be relied on only if there were a genuine and sufficiently serious threat to a fundamental interest of society – for example, if measures were necessary to ensure a minimum level of energy supplies in the event of a crisis. “In general, however, either appropriate regulation of general application or measures permitting an adequate specific reaction by the public authorities to forestall a given threat to public security will be sufficient to safeguard this interest and will,

<sup>182</sup> Ibid, para 55.

<sup>183</sup> Cases M.4110 and M.4197, *E.ON/Endesa* (2006), Case T-200/06, *Iberdrola v Commission* (appeal withdrawn) and Case M.4685, *ENEL/Acciona/Endesa* (2007)

<sup>184</sup> See *infra* n 218.

<sup>185</sup> Infringement No 2006/2222, and Case C-207/07, n 144 (the Court declared that, by adopting the Royal Decree-Law, Spain had failed to fulfil its obligations under the rules on freedom of establishment and free movement of capital).

<sup>186</sup> See *E.ON/Endesa* n 183 (decisions in September and December 2006) and Case M.4685, n 183, (decision in December 2007 IP/07/1858, Case T-65/08, *Spain v Commission* [2008] ECR II-00069 (application withdrawn).

<sup>187</sup> 26 September 2006.

provided that such measures are proportionate and non-discriminatory, be less restrictive than the establishment of prior conditions as to ownership of relevant undertakings.”<sup>188</sup>

As the Spanish authorities did not withdraw the measures, the Commission eventually brought enforcement proceedings against Spain and the Court confirmed that, by not withdrawing conditions to the E.ON merger, Spain had failed to fulfil its Treaty obligations.<sup>189</sup>

In *BSCH/A.Champalimaud*,<sup>190</sup> the Commission also found that Portugal had improperly applied Article 21(4) EUMR to a transaction, this time in the insurance sector. In this case the Portuguese Minister of Finance relied on measures restricting a foreign firm from acquiring in excess of 20% of domestic insurance firms to prohibit a proposed concentration with an EU dimension between Banco Santander Central Hispano (BSCH), a Spanish banking group and Champalimaud (which was ultimately cleared by the Commission). The Portuguese authorities had not communicated any public interest to the Commission but in press statements had stated that they had acted to protect national interests and strategic sectors for the national economy. The Commission considered that the Government should have notified its actions to the Commission and that the protection of national interests and strategic sectors for the national economy could not constitute a legitimate interest within the meaning of Article 21(4). Further, it entertained considerable doubt as to whether the actions were really based on prudential rules rather than constituting a discriminatory measure designed to prevent the opening of the financial services sector to non-nationals which violated the principles of freedom of establishment and free movement of capital inside the EU. The Commission thus ordered the Republic of Portugal to suspend the measures adopted and to notify them to it as required. In the end, the Portuguese authorities agreed to modified arrangements which were also cleared by the Commission under the EUMR.

Following the *Champalimaud* case, then Competition Commissioner Mario Monti stressed the importance of the Commission’s intervention in this case to the safeguarding of the internal market and that it should serve as a lesson that Member States should not try and prevent the opening of their markets to non-nationals and that operations which did not raise competition concerns should in principle be able to proceed. Since then it has regularly issued Article 21 decisions against Member States it considers to be violating the EUMR’s exclusivity provisions.<sup>191</sup> In *Cimpor*, for example, it challenged the actions of Portugal, in relation to a proposed acquisition of

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<sup>188</sup> In so holding, it relied on the interpretation given to the concept in the golden share cases, see *supra* C.2.b and e.g., Case C-503/99, n 102, paras 46-48, Case C-483/99, n 102, para 48, and Case C-463/00, n 102, paras 71-73.

<sup>189</sup> Case C-196/07, *Commission v. Spain* [2008] ECR I-41. Eventually the ENEL/Acciona bid did prevail, see *infra* n 199 and text.

<sup>190</sup> See Cases M.1616, M.1680 and M.1724 *BSCH/A.Champalimaud* (1999), IP/99/669, IP/99/772, IP/99/774 and IP/99/818, IP/00/296 (withdrawing the EUMR, Art 21 proceedings).

<sup>191</sup> “Our line is clear: if interference by any Member State—is not justified by a legitimate public interest, the Commission will continue to condemn such national measures”: SPEECH/07/301, N Kroes, “European competition policy facing a renaissance of protectionism - which strategy for the future?”, speech to the St Gallen International Competition Law Forum, 11 May 2007.

Portuguese cement business, Cimpor, a former SOE. The Minister of Finance refused permission to the transaction on the basis that its effects would be incompatible with the aims of privatisation (the measures were necessary to reinforce corporate capacity and efficiency in a way consistent with national economic policy guidelines). The Commission ordered Portugal to withdraw the measures holding that they constituted barriers to the freedom of establishment and free movement of capital and were not warranted under any grounds of public interest.<sup>192</sup> Further the Commission launched Article 21 infringement proceedings against Poland (in relation to a merger between *Unicredito/HVB*<sup>193</sup> which had been cleared by the Commission but which the Polish Treasury Minister intervened in order to protect the “privatisation” process of Polish banks and to ensure the de-monopolisation of, and the protection of competition in, the financial and banking services market infringed Article 21)<sup>194</sup> and Italy (for imposing unjustified obstacles in the way of a concentration with an EU dimension, approved by the Commission,<sup>195</sup> between Abertis of Spain and Autostrade of Italy).<sup>196</sup> Although in the latter case the matter was resolved prior to the Commission adopting an Article 21 decision, by Italy’s removal of the obstacles,<sup>197</sup> the transaction did not in fact go ahead.

Finally, it can be seen from the discussion above that although there have been a number of cases in which Member State have successfully relied on recognised interests to scrutinise a merger for its impact on non-competition factors, recognition of other legitimate interests have been rare.

#### **D. EFFECTIVE ENFORCEMENT**

It has been in the sections above that there is evidence of protectionism and of Member States enacting and relying on legislation in breach of the establishment and capital provisions. Further, that such actions may be affecting the working of the market economy.<sup>198</sup> Indeed, the events that unfolded following the Article 21 EUMR proceedings described in section C.3, indicate that although sometimes a bid will succeed despite the erection of national barriers to the deal,<sup>199</sup> in other cases bids may be withdrawn (as was the case, for example, in the bid for Cimpor) or the deal

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<sup>192</sup> C(2000)3543 Final.

<sup>193</sup> M.3894, IP/05/1299.

<sup>194</sup> The Commission considered that the Polish privatisation rules infringed the free movement rules, see IP/06/276 and *supra* C.2, and that the Polish Government had by imposing conditions on the transaction, violated Article 21 EUMR, M.4125 (2006), IP/06/277. The measure taken by the Polish state (enforcing the non-competition clause set out in the privatisation agreements of the Polish banks) de facto prevented, or seriously prejudiced the concentration and unduly aimed to protect competition and did not purport to pursue any other hypothetical public interest.

<sup>195</sup> Case M.4249 (2006), IP/06/1244.

<sup>196</sup> IP/06/1418.

<sup>197</sup> MEMO/06/414.

<sup>198</sup> See Dinc and Erel, n 79.

<sup>199</sup> Enel and Acciona were ultimately successful in acquiring Endesa and, under a revised proposal, certain parts of the business were sold to E.ON. Although therefore E.ON withdrew its bid it negotiated with competing bidders, Enel/Acciona to acquire certain parts of the Endesa business.

restructured to facilitate its success (as was the case in the Champalimaud and Polish bank cases).

In addition, there are some indications that economic patriotism may be growing, fuelled perhaps by debate played out in the national press, the lingering effects of the 2008 financial and economic crisis and heightened sensitivity about national security. Pressure from national business, politicians and interest groups may be making it difficult for national politicians to resist calls for measures designed to safeguard employment, industry and security in their country. In *AstraZeneca/Pfizer*, the political and media storm that the transaction attracted may have given Pfizer cause for concern that the Government would take steps to impose conditions to its completion and may ultimately have contributed to the failure of the bid. In *GE/Alstom*, the actions of the French Government led to the proposed transaction being significantly restructured. This type of outcome has caused one commentator to conclude “that while the Commission has the formal powers to order the suspension of national measures likely to frustrate a transborder merger, in reality Member States have the ability to modify and even frustrate such a merger. Time being at a premium for the merging parties, Member States do not appear phased by the prospect of infringement proceedings before the [Court] several years down the line.”<sup>200</sup>

It is true that enforcement of EU law against the Member States by the Commission lacks (some) teeth. Article 258 TFEU permits proceedings before the Court only following (i) the issue of a letter of formal notice, setting out the subject matter of the dispute and giving the Member State in question a reasonable time to respond, and, (ii) a reasoned opinion, describing the infringement and giving the Member State a reasonable time to comply. Only after a failure to comply with a judgment of the Court, finding an infringement, and following the issue of another letter of formal notice, can pecuniary sanctions, aimed at inducing a defaulting State to comply with EU law, be imposed under Article 260 TFEU. In addition to being somewhat cumbersome, therefore, the enforcement procedure rarely results in proceedings for a sanction for an infringement being pursued; although financial penalties may be more effective in securing compliance with EU law they may impose extra costs on Member States and inflame resentment towards unpopular EU rules.<sup>201</sup> Indeed, sanctions have not frequently been sought in the freedom of establishment and free movement of capital context.<sup>202</sup> The system thus relies principally on naming and shaming and political negotiation to resolve infractions. Further, a decision actually to launch infringement proceedings involves delicate political choices to be made.

Nonetheless, it is too pessimistic to suggest that enforcement by the Commission is ineffective. It has been seen that the Commission has shown itself to be willing to take action to counter the behaviour of Member States that it considers to be incompatible with the free movement and EU merger rules, both under Article 258 TFEU and/or under Article 21 EUMR. Further, that even if the Commission has not always been

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<sup>200</sup> Harker, n 80.

<sup>201</sup> See B Jack, “Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments” (2013) 19 *European Law Journal* 404 and D Chalmers, G Davies, G Monti, *European Union Law* (Cambridge University Press, 3<sup>rd</sup> edn, 2015), 374.

<sup>202</sup> See *supra* n 143.

able to act swiftly, or forcefully, enough under these procedures to prevent a Member State from impeding a merger transaction, such proceedings can produce the desired results. For example, in a series of cases, the Commission contested the very existence of expansive foreign investment laws, challenged golden share rules and required Member States to remove the offending measures. In addition, the Commission routinely acts under the EUMR where it considers that Member States are imposing unlawful barriers to EU mergers.

If the Commission is concerned about, and wishes to halt, any new rising tide of protectionism, however, it would seem essential that it seeks where possible to challenge legislation enacted in breach of EU law immediately using the Article 258 TFEU procedure. If it does not, the mere existence of the law may deter foreign acquisitions. Further, if it waits until such time as a Member State seeks to rely on those laws, there is a risk, given the time sensitive nature of most merger transactions, that its action will be ineffective. Once the Court has made a finding of an infringement, the Member State will be required to rectify the breach or face the possibility of subsequent proceedings and financial sanctions. Further, in the event that the breach is not rectified, private action will be facilitated.<sup>203</sup>

Indeed, more effective enforcement of EU law in this sphere might result if affected undertakings become willing to seek remedies themselves. It is clear that the rules on freedom of establishment and free movement of capital are directly effective<sup>204</sup> and may be relied on before national courts. Consequently, an undertaking whose deal is being thwarted, or has been thwarted, as a result of a Member State's unlawful erection of barriers to its merger, might commence national proceedings for an injunction and/or damages. National courts owe a duty of sincere cooperation to the EU<sup>205</sup> and are required, not only *not* to apply provisions of national law which contravene EU law,<sup>206</sup> but also to provide effective remedies in order to protect putative EU rights<sup>207</sup> and to ensure reimbursement or reparation of loss which has been sustained as a result of the violation.

In a series of cases the Court has established that a Member State that levies taxes or charges in breach of EU law (including these provisions) must in principle repay the taxes levied but not due (the right to a refund is the consequence and complement of the rights conferred on individuals by provisions of EU law<sup>208</sup>) and in *Test Claimants*

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<sup>203</sup> See especially *infra* n 212 and text.

<sup>204</sup> See Case C-101/05, n 161.

<sup>205</sup> See TEU, Art 4(3).

<sup>206</sup> See e.g., Case C-198/01, *Conorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055.

<sup>207</sup> Case C-213/89, *R v Secretary of State for Transport ex part Factortame Ltd* [1990] ECR I-2433.

<sup>208</sup> See e.g., Case 199/82, *San Giorgio* [1983] ECR 3595, para 12, Cases C-192/95-218/95, *Comateb* [1997] ECR I-165, para 20 and Case C-591/10, *Littlewoods Retail* [2012] ECR I-0000, para 24. In the absence of EU rules governing claims, proceedings governing the recovery are, in accordance with the principle of national procedural autonomy, administered by domestic law, subject to the principles of equivalence and effectiveness (national rules must be no less favourable than those governing similar domestic actions and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law, see Case 33/76, *Rewe* [1976] ECR 1989, para 5.

in the *FII Group Litigation v Inland Revenue Commissioners*,<sup>209</sup> the Court reaffirmed established case-law holding that a State will be liable to make reparation for loss and damage caused to individuals as a result of breaches of EU law for which it can be held to account where: (1) the rule of law infringed was intended to confer rights on individuals; (2) the breach was sufficiently serious; and (3) there was a direct causal link between the obligation resting on the State and the loss or damage sustained by those affected.<sup>210</sup> It also confirmed that the first condition is satisfied where the rule infringed is that relating to the freedom of establishment or free movement of capital<sup>211</sup> and that the second condition will be met if “a breach of Community law ... has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement ...”.<sup>212</sup> Otherwise, a claimant will need to demonstrate that the EU rules infringed were sufficiently clear and precise to render the errors of law inexcusable and that the Member State should have recognised that the restrictions imposed were not justifiable and/or proportionate.<sup>213</sup> Further, a claimant will have to prove that the damage resulted from the breach of EU law<sup>214</sup> and that other factors were not the principal cause to the failure of the bid.<sup>215</sup>

## E. CONCLUSIONS

This article has examined when Member States may intervene to weigh the economic and other public policy costs and benefits of M&A activity within the EU. An intricate picture has emerged, requiring: (i) an examination of EU competences, EU free movement law, EU merger law, national merger and foreign investment rules and the complex relationship between them all; and (ii) three different scenarios to be distinguished. First, the extent to which Member States can impose obstacles to intra-Union cross-border M&As on public interest grounds. Second, the extent to which

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<sup>209</sup> Case C-446/04, n 163.

<sup>210</sup> Relying in particular on Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paras 51 and 66.

<sup>211</sup> Case C-446/04, n 163, para 211, (“In the main proceedings, the first condition is plainly satisfied as regards Articles [49 TFEU] and [63 TFEU]. Those provisions confer rights on individuals... .”)

<sup>212</sup> *Ibid*, para 214.

<sup>213</sup> To determine whether a breach is sufficiently serious the following factors must generally be considered whether: in the exercise of its legislative power, a Member State has manifestly and gravely disregard the limits on its discretion; the rule infringed is clear and precise; the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable; the position taken by an EU institution may have contributed towards the adoption or maintenance of national measures or practices contrary to EU law.

<sup>214</sup> Case C-446/04, n 163.

<sup>215</sup> It is for the national court hearing the claim, applying rules of national law (subject to the principles of equivalence and effectiveness, *supra* n 208) to assess whether the loss and damage claimed flows sufficiently directly from the breach of EU law or whether other factors might have contributed to the failure. See also by analogy, non-contractual liability proceedings brought against the Commission, Case T-212/03, *My Travel v Commission* [2008] ECR II-1967 and Case T-353/01, *Schneider v Commission* [2007] ECR II-223 and, on appeal, Case C-440/07 P [2009] ECR I-6413.



they may impose obstacles to foreign investment from outside of the EU/EEA on public interest grounds and third, the extent to which they can authorise mergers which are liable to impede effective competition in the EU on public interest grounds.

A fundamental tenet of the EU is that the internal market, an area within which the free movement of goods, persons, services and capital is ensured, works towards the wider objectives of the EU, including “the sustainable development of Europe based on balanced economic growth and price stability” and “a highly competitive social market economy.”<sup>216</sup> Consequently, Member States may generally only adopt legislation or other rules prohibiting, dissuading, discouraging, impeding or rendering less attractive investment, or an acquisition of shares giving rise to a definite influence over a company, emanating from another Member State where proportionately pursuing a public interest objective (as defined by the TFEU and the case-law of the Court). Whether or not they are reviewing a concentration with or without an EU dimension, therefore, Member States may act proportionately to protect accepted public policy interests (such as public and military security, plurality of the media and prudential rules) but may not act pursuant to restrictive laws or measures: purely to protect their own economic or financial interests; to protect open-ended and ill-defined public policy goals; to shield national firms from competition; or otherwise act pursuant to such rules to impose disguised restrictions on trade between Member States. Such rules and acts create uncertainty which is liable to undermine business confidence and thwart achievement of EU goals.

Despite established jurisprudence in this sphere the Commission has sought on a number of occasions to counter Member States’ measures which may breach EU free movement principles. If the Commission does wish to ensure that Member States do not erect irreversible barriers to merger transactions, however, it would seem axiomatic that it acts, as it did in the *Golden Share* cases, systematically under Article 258 TFEU against infringing legislation as soon as it comes to its attention. If it delays M&A might be deterred by the resulting lack of clarity and time sensitive merger transactions may be obstructed. Even if it is true that such proceedings are unlikely to result in sanctions being imposed on an infringing Member State, they may be crucial for two reasons. First, the status of the national law will be clarified and Member States will be required to remove legislation found to be in breach of EU law from their statute books. Second, if the Member State does not comply with a Court judgment finding an infringement, and the infringement persists, the initial proceedings will provide the springboard both for subsequent proceedings by the Commission, and the possible imposition of financial sanctions, and/or private action by those affected by the breach.

The extent to which Member States may restrict foreign investment from outside the EU/EEA on public interest grounds is less well-defined and more controversial. Not only is the division between the establishment and capital rules not clearly drawn, especially where measures applicable to third countries are at stake, but there is less clarity as to how the public policy justifications are to be interpreted in relation to restrictions operating against third country operators. It is established that the exceptions and justifications may be interpreted more flexibly, but the extent to which Member States may protect interests beyond those permitted in an intra-Union

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<sup>216</sup> TEU, Art 3.

situation (for example whether it may act to protect EU economic or financial interests) is unclear. This issue may become more important if the trend towards treating foreign investment with suspicion continues; in particular, Member States may wish to be free to limit foreign investment from countries where EU firms do not have free access to the market. It may also be affected by the conclusion of international agreements with pre-establishment investment commitments between the EU and third countries. Indeed, if national or third country treatment obligations are incorporated they are likely to bring the law in relation to these third countries more closely into line with that which applies in intra-EU situations.

Where the EUMR applies to a merger transaction, Member States may not intervene to authorise a merger raising competition concerns on public interest grounds. Where it does not apply, however, there appears to be no EU barrier to Member States' exercising regulatory *approval* of mergers between domestic companies on public interest grounds. Because of this, the Commission has, over the years, expressed particular concern about the operation of a rule, set out in the EUMR, which excludes EU jurisdiction over a concentration where each of the undertakings concerned achieves more than two-thirds of its EU turnover within one and the same Member State.<sup>217</sup> Although, the two-thirds proviso ordinarily distinguishes satisfactorily between concentrations with EU relevance and those without it, it seems that there are "a small number of cases with potential cross-border effects in the [EU] which . . . fall under the competence of the NCAs as a result of this rule." Further that, "[i]n a substantive respect, public interest considerations other than competition policy have been applied in a number of cases falling under this threshold to authorize mergers which could have given rise to competition concerns."<sup>218</sup> For example, a merger between energy companies *E.ON/Ruhrgas* fell outside the scope of the EUMR and the German Government's decision to authorise the creation of the national champion, following the prohibition of the merger by the Bundeskartellamt, caused considerable consternation and anxiety about the impact of the merger on competition throughout the EU.<sup>219</sup> In order to rectify this problem, and to seek to guarantee that merger control across the EU ensures the protection of undistorted competition, a reconsideration of the two-thirds rule set out in the EUMR would be required. Whether or not the Commission will be prepared to pursue such a change and/or whether it might become more sympathetic to the creation of national, or EU, champions remains to be seen.

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<sup>217</sup> See *supra* n 166.

<sup>218</sup> Commission report to Council on the functioning of Regulation 139/2004 COM(2009) 281 final, para. 16 (see also N Kroes, SPEECH/06/60, speech before the EP Economic and Monetary Affairs Committee, 31 January 2006). It can also mean that competing bids for a company may be assessed under different regimes, see e.g., the competing bids for Spanish electricity operator, Endesa discussed *supra* C.3.b.

<sup>219</sup> In this case the German Monopolies Commission had given a negative evaluation of the merger on both competition and public policy grounds, see e.g., NERA Energy Regulation Brief, <http://www.nera.com/extImage/5483.pdf>. See also e.g., discussion of Lloyds TSB/HBOS *supra* B.2.